

THE CLASSICS OF INTERNATIONAL LAW

EDITED BY

JAMES BROWN SCOTT

*Member of the Institute of International Law
President of the American Institute of International Law*

SYNOPSIS JURIS GENTIUM

BY JOHANN WOLFGANG TEXTOR

*Jurisconsult and Principal Professor of Law
in the University of the Palatine Electorate, and Electoral Councillor*

EDITED BY LUDWIG VON BAR

*Professor of Criminal Law and Procedure and of International Law
in the University of Göttingen*

VOL. I. A Reproduction of the First Edition, with Introduction
by Ludwig von Bar, and List of Errata.

VOL. II. A Translation of the Text, by John Pawley Bate, with
Index of Authors Cited.

THE LORD BALTIMORE PRESS
BALTIMORE

Synopsis of the Law of Nations

BY

JOHANN WOLFGANG TEXTOR

*Jurisconsult and Principal Professor of Law
in the University of the Palatine Electorate, and Electoral Councillor*

Basel

At the charges of Johann Michael Rüdiger

From the press of Jacob Bertsch

1680

VOLUME TWO

THE TRANSLATION

BY JOHN PAWLEY BATE, LL. D.

Reader of Roman and International Law in the Inns of Court, London



WASHINGTON, D. C.

PUBLISHED BY THE CARNEGIE INSTITUTION OF WASHINGTON

1916

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INTRODUCTION.

The Textor family,¹ whose original name indeed was Weber and was Latinized, as often happened among scholars of a certain period, seems to begin with one Georg Textor who, in the second half of the sixteenth century, lived in the small city of Weikersheim (now belonging to Würtemberg). His son Wolfgang Textor, a university graduate, entered into the service of Count von Hohenlohe-Weikersheim; and afterwards, when Weikersheim passed into the possession of the baronial family of Hohenlohe-Langenburg-Neuenstein, he held the post of director of the Hohenlohe Chancellery in Neuenstein for thirty years. Here, on January 20, 1638, as the fruit of a second marriage (with Magdalena Praxedis Enslin), was born his eldest son Johann Wolfgang Textor, the author of *Synopsis juris gentium*.

Johann Wolfgang Textor, the great-great-grandfather of Goethe, on the maternal side—Goethe's mother having been a Textor—after losing his father, when not quite twelve years old, matriculated at the University of Jena at fifteen years of age, and two years later entered the University of Strassburg in Alsace; in 1658 he became *Praktikant* in the Imperial Chamber, which at the time had its seat at Speyer; and in his twenty-fifth year he was appointed to the post of director of the Hohenlohe Chancellery in Neuenstein, which had formerly been occupied by his father. His relations with the ruling Count seem to have been pleasant; he went several times to Vienna in the service of the Count. But his ambition was directed to an academic appointment. On April 9, 1663, on the strength of a dissertation, *De remediis adversus sententiam competentibus*, he obtained the

¹ Regarding the family and life of Textor, cf. especially Dünzter in the periodical *Die Grenzboten*, annual series, No. 47 (1888), II, pp. 271 *et seq.*; for a short account, cf. *Allgemeine Deutsche Biographie*, Vol. XXVII, p. 630; for an account of his writings, cf. Johann Pütter, *Literatur des Teutschen Staatsrechts*, I (Göttingen), 1776, p. 295; with special reference to *Synopsis juris gentium*, cf. v. Ompteda, *Literatur des gesamten sowohl natürlichen als positiven Völkerrechts*, I (Regensburg), 1785, pp. 289-293; also Jöcher, *Gelehrten-Lexikon*, Part IV, p. 1079.

academic distinction of *doctor juris* from the University of Strassburg, and in the month following he married Anna Maria Priester, daughter of a Protestant pastor. On April 23, 1666, he became professor of the Institutes in Altorf, where he delivered lectures with success, and wrote a large number of treatises upon German law. His important *Tractatus juris publici de vera et varia ratione status Germaniae modernae*, published in 1667, contains a special chapter which treats of the possible union of the various religious bodies which were countenanced in the German Empire. This led to a literary feud with the defenders of Protestant orthodoxy, while the rising fame of his lectures caused his transfer in 1670 to the professorship of modern Roman law (Pandects). In 1673 he accepted a call to Heidelberg as the first professor of jurisprudence, becoming at the same time assistant-judge of the Court and of the Matrimonial Tribunal. He took an active interest in religion and in ecclesiastical law, as is evidenced by his *Theses de jure religionis*, which upon its publication in 1676 attracted much attention (and was, in consequence, confiscated at the instigation of the orthodox party), and also by his *Disputatio de jure ecclesiastico*, which appeared in 1677. The *Synopsis juris gentium* was published in 1680 at Basel (by Johann Michael Rüdiger).

In December, 1690, the Council of the City of Frankfurt-on-the-Main elected him to the post of syndicus; and at the end of March, 1691, Textor assumed the duties of this office, which he occupied until his death. This occurred on December 29, 1701, and was due to apoplexy. So great were his zeal and industry, and they were so well aided by an extraordinarily retentive memory—Textor is said to have known by heart a large part of the *Corpus juris civilis*—that his official duties did not prevent him from repeatedly engaging in active literary work. For instance, in 1698 he published a collection of academic disputations, and in 1701 the historico-legal treatise, important even in our own day, *Tractatus de jure publico statuum imperii* (reprinted at Frankfurt, 1721, 640 pages).

Textor's work gives evidence alike of the wide reading and learning of their author and of his practical outlook, sharpened by a wide official experience. While as a rule he investigates

the results of things that have been positively sanctioned by statute and custom, and traces the history of the law in force, and while he respects the opinions of the authorities, still he is not a mere positivist without independent judgment. His works on religion and the church were written in furtherance of an ideal. In the *Synopsis juris gentium* we meet forceful utterances directed against arbitrariness and against the pernicious rules which egotism and servility dictate, and we also find in it hearty recognition and commendation of the projects and measures directed to the utmost possible maintenance of peace. From the mass, and sometimes the confused mass of his arguments and counter-arguments, it is not always an easy task for the reader to pick out Textor's own opinion, and the reasons on which this opinion is founded; but, especially in the *Synopsis juris gentium*, Textor appears as a keen jurist, well versed in history and in affairs, with an accurate perception of the minutiae of the matters treated, and of the possible and actual differences in their legal effect. Not infrequently indeed a certain indecision is observable and a proposition which he has put forward and maintained with emphasis is at the end of the discussion in great measure undermined and rendered unstable by the exceptions which have to be admitted.

Textor's formal conception of the relation between the *jus naturæ* and the *jus gentium* is different from and more correct than that of Rachel (whose dissertation, printed some two years previously, is not, however, referred to by Textor), because he treats the *jus naturæ* in its application to the relations of states to one another—according to Textor's opinion identical with the *jus gentium primævum* (cf. Chapter I, §§ 1-4)—as part of the *jus gentium*, which, therefore, consists of two elements, the *jus naturæ* and that other law which derives its binding force from the customs (*exercitium*) of nations. And since, according to this judgment, the *jus gentium* applies to all nations alike, Textor therefore thinks the Roman definition, which finds in the *jus gentium* that department of law which "*apud omnes gentes peræque custoditur*", is the really correct one. It is not quite

* Textor in his preface employs as a sufficient justification for his considering a few matters relating to the Law of Nature only, both this view and the additional fact that Grotius in his work, which by its title is supposed to treat of the Law of Nations only, introduces also

clear how Textor views the relation of these two component elements, inasmuch as cases may occur where custom or practice is contrary to the *jus naturæ*. Which of the two, the *jus naturæ* or the *exercitium*, is in such cases to be deemed the real law? This point was brought out more clearly by Grotius when he distinguished between a Law of Nations that compels the conscience, *jus gentium "internum"*, and one that binds outwardly.

The discussion in subsequent chapters of questions relating to the Law of Nations is more frequently based on the principles of private law, and therefore does not do justice to the real needs and relations of the Law of Nations. Likewise, Textor has not altogether avoided the mistake of mixing up law and morality, a mistake due to his assuming the immediate existence of a Law of Nature—which must not be confounded with the argument based on the nature of the thing, an argument which considers certain definite relations as of an undoubtedly positive character: it is this mixing up of law and morality that accounts for his drawing a *juridical* distinction between *bellum justum* and *bellum injustum*.

The specific consideration of the Law of Nations begins with "*De dominiis eorumque divisione et acquisitione*" in Chapter VIII. In this chapter Textor distinguishes correctly between the international sovereignty, *dominium jurisdictionis*, of the *universitates* (states) and the civil-law ownership of private individuals. The former, which is said to have originated through partition (of the earth) and *mutuus consensus*—for partition is useful—is viewed as the primary institution, while private property is traced back to permission on the part of the *universitates*.

Then follows (Chapter VIII, § 15) an examination of the question whether or not the sea is an object of property. In accord with Grotius, Textor answers "No". The sea can not be seized and occupied; but it is different with regard to parts of the sea

matters which do not pertain to the Law of Nations, but to the Law of Nature. As Ompteda remarks, p. 292, Textor views some questions that are part of internal and municipal law as belonging to the Law of Nations. Pütter indeed describes both of Textor's principal works upon political law as "very practical and fairly orthodox books, but still of no extraordinary merit". Ompteda says, p. 290, that Textor has carried into further detail what Rachel only sketched.

surrounding a country. According to the Law of Nature a *res nullius* alone can be acquired through *occupatio*; there may, however, be an acquisition of ownership of enemy property; this is a result of the *jus gentium secundarium*. Consideration of the Law of Nations is here interrupted by a discussion, from the point of view of civil law, of game-laws, the law of the chase, the law of inheritance, and other modes of acquisition of ownership; and in § 44 the *jus albinagii* is examined, but really only from the point of view of private law. (The justification of this—to us—illogical insertion is that Textor conceives the *jus gentium* in the Roman sense; that is, he views the Law of Nations as a part of the *jus gentium*.)

Chapter IX, “*De origine regnum et quibus modis jure gentium acquirantur*”, deals primarily with constitutional law, but in such a manner that considerations of the Law of Nations are woven into it. Dominion over a people, according to the *jus gentium primævum*, is established by the consensus of the people alone; but, according to the *jus gentium secundarium*, by war and migration as well. According to the accepted *jus gentium*, the modes of acquisition are: *electio*, *successio*, *occupatio bellica*, *translatio*, and *præscriptio*. It should be noted that, according to Textor, *occupatio bellica* (in a *bellum justum* and, therefore, not in a *bellum injustum*) establishes dominion as the result of complete victory over the opponent. In such a case the sovereign requires no act of consent of any kind on the part of the Estates (*ordines*)—we should say the National Assembly. *Translatio* may take place absolutely or *cum reservatione*. The latter occurs in the grant of a fief, whereby the vassal obtains, nevertheless, the *jura majestatis*, and is only bound to fealty towards his suzerain. Individual provinces *may* (§ 24) be acquired by prescription; for instance, when the former rightful lord, not exercising his right to reclaim, gives tacit consent to the transfer of dominion.

The following Chapter (X), “*De rebus publicis eorumque juribus*”, contains what are strictly principles of constitutional law, but are fraught with weighty consequences in the Law of Nations. In this connection it should be noted that, with regard to the Law of Nations, Textor does not yet attach full international

significance to the condition of affairs which is actually organized and which is giving promise of duration; he admits only the legality which holds in private law. When a state frees itself by recourse to force from the authority of a prince, this freedom, in order to be valid in law, must first be recognized by the former ruler in a renunciation of his rights. A republic which has come into being in this way is of course allowed by other nations to possess treaty-making capacity, but while (says he) a treaty of peace concluded with another nation does not in itself bar the right of the (ejected) prince, it may still afford a basis for its destruction by prescription—subtleties and timorous inconsistencies that can not satisfy and that did not correspond with the actual relations of states at the time of the first English revolution; but they do not prevent Textor from announcing the somewhat revolutionary principle that a prince who has violated the *leges fundamentales* of the nation and has had in consequence to quit his country, by that very act loses his *imperium* (§ 19). The conception of *leges fundamentales* is, therefore, of importance in the Law of Nations, and it is for this reason interesting to see how it is treated by Textor in Chapter XI, “*De legibus imperiorum fundamentibus*”. As *leges fundamentales*, Textor considers such laws as a prince or king can not change or annul by himself, with the result that an act incompatible therewith—and, therefore, an alliance with another nation incompatible with these *leges fundamentales*—is invalid. Mere promises (*promissa*) of princes and *leges conventionales* which do not affect the *summa potestas* are not *leges fundamentales*, according to the judgment of Textor. Acts of princes in violation of promises previously made are void only in cases where the *promissum* specifically provides for their nullity. If in the latter case (Textor points out) his views differ from those of Grotius in imposing narrower limits on the arbitrary power of princes, still (so Textor declares at the end of the chapter) there is no need to observe the *leges fundamentales* in case of plain *necessitas* (real necessity); for instance, when a hostile army threatens and when the *salus publica* is involved (§§ 16, 17). The weakness of this entire chapter is palpable. The definition being drawn merely from the working of the thing defined—a method necessarily productive of doubts—fails in

practice; and contrary to the opinion of Textor, the constitutional laws of many nations rest on the (formally) one-sided promise of the prince. And even if the rule be that in a case of urgent necessity the *leges fundamentales* cease to operate, such necessity can easily be declared to exist, and thereby the violation or even the abolition of a constitution be justified.

After these detailed discussions regarding constitutions, Textor considers, in a remarkable and unexpected sequence, in Chapter XIII, "*De commerciis et conventionibus gentium*", the utility of commerce, the taking of interest and the prohibition of certain transactions, also certain restrictions on commerce, and monopolies. From the point of view of the Law of Nations, the notable thing here (§§ 21 *et seq.*) is the treatment of the question whether, in time of war, commercial intercourse with subjects of the enemy is permissible. Textor answers this question affirmatively, with this reservation, that the fatherland must not suffer prejudice and that in consequence the supply of arms and provisions to them is absolutely forbidden. The practice of capturing enemy property on the high seas (strictly speaking, also the capture of private property conveyed by land) is harmonized with this liberal view by the proposition that it is permissible to seize all goods once they have become the property of an enemy subject (hence, also goods which have been lawfully sold to subjects of the enemy); but special agreements by which *mutua securitas* is promised may operate to protect such goods. These discussions regarding commerce bring Textor to consider the law applicable to commercial transactions, that is, to the sphere of international private law. He decides in favor of the *lex loci contractus* (the law of the place where the contract is made), basing this view on the assumption that the contracting parties have this law in mind, and therefore on the assumption that they tacitly and voluntarily submit to this law. He also holds that in commercial transactions with citizens of another country the *jus gentium* is subsidiarily applicable, and that in certain relations the law of the place where the contract is to be performed must govern. But if by virtue of a privilege the subjects of a state may enter into a contract in the presence of their consul, they have therewith the privilege also of being judged according to their own (home) laws.

Upon this discussion of matters of private law there follows, first, the affirmation by Textor, as a principle of constitutional law, that in case of need a prince may appropriate the commercial profits of his subjects; and second, the answer to another question of constitutional law, namely, Under what conditions may certain commercial transactions be forbidden? But at the end of the chapter we again meet with a principle of the Law of Nations, namely, that agreements between princes are not to be judged according to a particular territorial law, but only according to the Law of Nations; while, in regard to the agreements concluded by a prince within his own country (the reference is probably to agreements with his own subjects), it is to be assumed that the prince will honorably (*de honestate*) abide by the laws he himself has approved. Textor does not mention agreements between princes (and states) and foreign subjects.

Chapter XIV treats of ambassadors (and plenipotentiaries) of states and princes. After having shown the influence of embassies, Textor ascertains who has the right to send ambassadors enjoying the privileges accorded by the Law of Nations. Whoever has power to conclude treaties with other princes also possesses the (active) right to send embassies; even vassal states (princes in feudal relations) have this right. It pertains to an exiled prince also (§ 13), as long as he possesses military power and has hopes of reinstatement. The ambassador must be charged with a *publicum officium*, in which are included missions of congratulation and condolence (with other princes). Textor distinguishes correctly between the credentials (*literæ credentiales*) which an ambassador must present and instructions (not to be disclosed) imparted to him (§ 14). Further on (§ 31), Textor speaks of those plenipotentiaries upon whom is conferred full power *cum libera* (a phrase used of agents in civil law, the word *administratione* being implied). Not a mere titular prince, but only a prince in actual possession of *imperium*, has the right to receive ambassadors. On the other hand, equal rank as between the prince who receives and the prince who sends ambassadors is not deemed necessary. But *ambasciatores* (ambassadors of the highest rank) are employed only between princes of equal rank.

Enjoyment of ambassadorial privileges requires consent (*admissio*) on the part of the other prince or state; tacit assent is

inferred when the ambassador is announced and no objection is taken. A groundless refusal to receive an ambassador is not a breach of a right (§§ 28, 29). Third states are not bound by the *admissio*; ambassadors can not claim privileges from them.

The ambassadorial privilege, nowadays termed "extra-territoriality", is to some extent restricted by Textor, who in this respect departs from the far more correct views of Grotius (II, ch. 18, §§ 4 *et seq.*). Not only is the receiving state to be allowed, in case of need (necessary self-defense), to kill an ambassador who resorts to hostile acts, but also to punish an ambassador who by a criminal act injures the receiving prince or his subjects. It is more to the point when Textor not only admits the jurisdiction of the *forum rei sitæ* (in suits about immovables) over ambassadors, but also allows that action may be brought against them abroad for contractual debts, in the same circumstances as, under Roman law, the *legati* of Roman cities could, when resident in Rome, be sued in Rome. (See L. 4, D., *de judiciis*, 5, 1.)

Chapter XV treats of the law of burial. From the point of view of the Law of Nations the question that here (§ 25) arises is whether or not there is an obligation to bury enemies killed in battle. Textor denies the legal obligation, but adds that such burial is a Christian act, and examples of such conduct are cited from antiquity. This chapter is evidently intended as a transition to the many chapters dealing with war, which now follow.

Thus Chapter XVI, "*De bello in genere ejusque requisitis*", determines under what conditions we may speak of "war". Dismissing the idea of private war and that of a *bellum mixtum*, which would on one side only be a *bellum verum*, Textor says that real war occurs only "*inter potestates vel his similes*", that is, between sovereigns or authorities of equal power, and further that *consensus* to enter on the war and a declaration of war (*indictio*) by the public (supreme) authority are preconditions, and that in *foco conscientiæ*, although not according to the *jus gentium*, there must also be a *justa causa* for the war. According to this conception of Textor, which differs from that of Grotius (I, ch. 3, § 4, n. 2), a *magistratus*, that is, an official, can not enter on a real war except in the case of great danger. The

Estates of the German Empire of that time can not be instanced in support of the contrary view; for, as Textor says, they possessed rights analogous to the rights of sovereignty and were not mere *magistratus*. When states sunder a league that unites them, then, he believes, real war may arise. This implies, of course, that when a dependent state declares that it has severed its ties of dependence, the right to wage war now arises in its favor.

In Chapter XVII, entitled "*De justis bellorum causis et forma clarigationis*", Textor emphatically rejects as a *monstrum abominabile* the so-called *raison de guerre*, the doctrine, that is, that in certain circumstances there is no need to conform to the law of war. A trifling offense can not be considered as a *justa causa*; in such cases it is necessary to wait and find out if it is not possible to obtain satisfaction or indemnification without resorting to war. If a state refuses to give back something to which another state is justly entitled, or if it refuses to pay an indemnification justly due, or to give satisfaction for a wrong committed by its subjects, then war may be justified; and it is also directly justified by an *injuria atrox*, such, for instance, as contumelious treatment of ambassadors. If a pecuniary claim is to justify (in the last resort) a war, this claim must not only be for a considerable sum, but there must also be certainty or the highest degree of probability that it is well founded.

War can not, strictly speaking, be a *bellum justum* on both sides; but formally, war is always considered as just on both sides (that is, both sides may claim the rights of belligerents), *propter obscuritatem rerum*. In order to remove doubt regarding the rightfulness of a war in concrete cases, Textor agrees with Molina's suggestion that whoever contemplates entering upon war should first secure the opinion of experienced and judicious persons. But, since such opinion is frequently given *ad bene placitum*, and since there are degrees of conviction as to what is really right, it is better to avert war through negotiation or through an arbitral tribunal (§ 29).

Textor now examines a few special grounds advanced as sufficient to justify war. War (he says) may not be declared against non-Christian nations merely because of their unbelief; their belief harms themselves only and does no wrong to other nations;

it is a case of *defectus jurisdictionis*. Likewise, refusal to permit the passage of an army through one's land can not justify war. But, as Textor points out, the example of the Israelites (*Numbers*, ch. 21, vv. 21 *et seq.*) might be cited against this principle; for the Israelites waged war against the Amorites for their refusal to let the Hebrew armies pass through their country, and took possession of it; but Textor rejects this illustration as inconclusive, observing that God granted a *special* dispensation to the Israelites for this act and therefore it does not hold for other cases. We see, however, that our present conception of *neutrality* has by no means attained its full development with Textor, since he deems it justifiable in an extreme case (case of extreme necessity) to force a passage by arms, provided security is furnished against possible damage and the army marches through in divisions.

Nor is a *justa causa* of war furnished by the intent to take the Holy Land (Palestine) from the Turks, nor by a vague fear of being harmed by the state against which war is to be waged, nor by the refusal of marriage on the part of a woman (or generally on the part of all women) of the other state, especially when there are plenty of women in our own country. (It seems strange that Textor should think it necessary to protest against such pretexts for war.) Refusal to render what is (clearly) due turns the war into a unjust one on the part of the defending state, while on the other hand war must be considered justifiable on its part when there is a doubt about the righteousness of the cause of the attacking state.

The declaration of war, which is a requisite of a just war, must be brought to the knowledge of the *summa potestas* of the opposing state; the form in which the declaration is made is unessential. Thus, declaration of war may be made by manifesto, and in a case of necessity by notification given to a commander of the opposing power—which can be regarded as a form analogous to the *insinuatio ad domum* employed in civil suits.

On the other hand—here Textor relies on a provision of the Golden Bull (Tit. XVII, § 5) regulating feuds in the German Empire—a certain space of time must elapse between the declaration of war and the commencement of hostilities.

Chapter XVIII, “*De effectibus bellorum et quantum in illis liceat*”, answers first, though not in logical sequence, the question, how long a war may be justly waged, that is, until the attainment of what object. Textor’s answer is that war may continue until the belligerent has obtained his claim together with indemnification for expenses, and in some circumstances security against future damage too, which will, therefore, amount at times to more than what his opponent originally owed (§§ 1-9). After this answer Textor passes to the question, What hostile measures are permitted in war? According to him, force of arms and stratagem are here on a par; but stratagem (*dolus*) must not be contrary to good morals and *honestas* (decency); thus the use of poison and subornation of treason are excluded, although a treasonable offer may be accepted. Not drawing any exact distinction between the *measures* of war and the *objects* to which military force may be directed, Textor maintains (§§ 17 *et seq.*) that it is no longer lawful to kill women, children, and the aged; that armed persons may be killed in battle only, except the fomenters of the war—in making which exception Textor strays into the domain of morals, and wrongly assimilates war to a criminal process, an error of principle committed by Grotius also. Otherwise, the acceptance of an unconditional surrender implies that life will be spared: yet Textor yielded to a barbarous custom, still in vogue at that time, whereby those who surrender after having resisted to the utmost may be put to death (§ 23) “for example’s sake” (that is, by way of terrorizing).

Textor says it is unlawful to kill hostages, on the ground that no one can so far dispose of himself as to justify somebody else in killing him or as to make the hostage answerable with his life for the acts of others (§§ 24, 25). Hostile acts involving moral ignominy, such, for instance, as rape of women, are unlawful (§ 30). The destruction of property is permitted only in so far as it furthers the operations of the war; therefore—and here we notice progress and a modern rule of war—fruit-bearing trees, palaces, works of art and edifices for religious worship may not be destroyed (§§ 31 *et seq.*). The custom of enslaving prisoners, remarks Textor, has not been practised in the last three centuries, and this must apply to the Turks as well, but ransom may be

exacted *ex æquo et bono*; indeed, he seems to think that the individual who effects the capture is entitled to the amount of the ransom—a rule which admits exception only in case of distinguished prisoners. Textor here takes a backward step, opposing the view expressed (III, ch. 6, § 14, n. 1) by Grotius, and adjudges booty taken in war to the individual soldier. Of course a commander may forbid individual looting, and on the other hand permission to loot only strengthens the right of the individual to the booty.

An extended, but in essentials a profitless, examination of *postliminium* (§§ 77, 107) concludes the chapter. The important fact, namely, that even in Textor's time there could be a discussion about the loss of private rights by reason of capture in war, especially capture by the Turks, is not adverted to. (The question whether an individual, captured by the enemy and thereby losing an office, can claim to be reinstated at the expiration of his captivity, can not be settled by analogy with the Roman *postliminium*, but rather in accordance with special conditions and laws.)

Further, Textor's opinion that *postliminium* still exists in case of immovables is incorrect, while he is correct in holding that no *postliminium* exists in the case of movables. But if whole tribes engage in piracy, then *postliminium* ought to apply with regard to them even as it does to the taking of prisoners by the Turks, for the Roman law relating to confiscation and capture by pirates denies altogether that spoliation and imprisonment by pirates can produce any change of legal position.

In Chapter XIX, "*De induciis et jure armistitii*", Textor holds, as against the view of Grotius (III, ch. 21, § 5)—and rightly, since war does not take place directly between individuals, but rather between the authorities of the state considered as an entity—that an armistice concluded between such authorities binds their respective subjects immediately and hence does not require special publication. (The reason given for holding this view, namely, that the subjects are here jointly represented by their *princeps*, is not entirely correct.) Textor also declares that an armistice concluded between the commanders and limited in time or space does not need ratification. In Textor's view an

armistice had not quite the same effect that it has according to our modern conception. Only actual fighting is to cease; and therefore, for example, pushing forward operations connected with a siege is allowed.

Chapter XX, "*De pace et ejus mediatoribus*", deals with the question, Who is entitled to conclude peace? Textor answers that whoever has the right to declare war has also the right to conclude peace. But this authority is rightly denied to a prince in captivity, for the reason that as prisoner he has lost the *administratio* of the state (§§ 16, 17). On the other hand, in consequence of a principle of private law which we meet frequently in Textor's writings, a prince who has been unjustly exiled may *de jure* conclude peace; and the fact that in such circumstances subjects under the authority of a "tyrant" like Cromwell do not obey the exiled prince, seems to Textor only a *juridically* inoperative fact.

A treaty of peace when concluded must be interpreted in as liberal a way as possible, with the exception of provisions relating to a cession of territory. If mediation (by a state not involved in the war) is to take place, both combatants must give their consent thereto. Assent to the mediation of any given power does not in itself mean assent as regards the person of the mediating minister (§ 56). But the mediating power may employ its minister. Rejection of the proposals of the mediator is no cause for war (§ 59).

Chapter XXI, "*De ratificatione, executione et garantia pacis*", declares that ratification is necessary for the conclusion of peace; but ratification may be given tacitly by carrying out the terms of the treaty of peace. By virtue of its very nature, peace is not subject to limitations of time. The carrying out of terms stipulated in the treaty of peace, if not intrusted to a third state, rests in its details with the state on which the duty of performing the respective terms is cast by the treaty of peace. The performance of a duty incurred in the treaty of peace may not be compelled by force of arms unless war is again first declared. The execution of unambiguous stipulations may not be postponed by reason of the fact that there is doubt regarding the meaning of other provisions. If a third power has guaranteed the carrying out of the treaty of peace, it is only under an obligation to interfere by force if one party unjustly *refuses* to carry out the peace conditions.

In Chapter XXII, "*De ruptura pacis et causa superveniente*", Textor very correctly distinguishes between rupture of a peace and a new cause of war; the former does not always furnish an immediate justification of a declaration of war. Allies of the party breaking a peace are not themselves thereby rendered liable for the rupture of the peace.

In Chapter XXIII, "*De fæderibus in genere ac diversis eorumdem speciebus*", Textor correctly maintains that an alliance may be designed to provide for other aid than troops—for instance, the furnishing of provisions or money or apparatus of war and ammunition. It is to be noted, however, that Textor considers as valid the alliance concluded with an actual though usurping ruler, if the people are obedient to his orders *and* if the alliance has not an objectionable purpose, especially not the objectionable purpose of aiding an unlawful ruler against the lawful king, a conclusion which shows that Textor had not clearly grasped the difference between intervention in the internal affairs of a state and other international questions. (The result is incorrect in so far as it concerns the exceptions to the rule just stated.) On the other hand, Textor is quite right in saying that a usurper—and here he names Cromwell¹—is bound by the alliances concluded by the former lawful ruler. Then follows a minute discussion of the question, how far a Christian ruler may go in concluding alliances with non-Christian rulers and peoples, especially Mahomedan. In conclusion, our author reviews the different kinds of alliances and in particular examines offensive alliances from the point of view of validity and lawfulness.

Chapter XXIV, "*De obligatione ex fædere ejusque interpretatione*", treats of the contents, the observance and interpretation of alliances. Honest Textor characterizes as *falsissima* the opinion of certain pseudo-politicians who represent to princes that treaties are to be observed only as long as they may seem useful (*e re*). He considers it as self-evident that an alliance extends to princes and states that are already allies of either party; and taking a view different from that of Grotius (III, ch. 16, § 13), answers in the affirmative the question whether the alliance ex-

¹The family relations between the princely house of the Elector Palatine and the Stuarts—Heidelberg was a university of the Elector Palatine—were not entirely without influence upon Textor's views.

tends also to princes and states that subsequently become allies of the other party, although the question is one which really can not be answered with an unqualified "yes" or "no". (It is unlawful, therefore, to make war on the ally of the other contracting party.) In this connection—discussion of the effect of different kinds of alliances—and with numerous differentiations, Textor again returns to the question of the effect of an alliance when some individual has unlawfully seized on the supreme power of a state, or, as it is put in legal language, where a usurpation has taken place.

Chapter XXV, "*De renunciatione ac dissolutione fœderis*", discusses the proposition that one party to an alliance may not withdraw from it at an inopportune moment or without weighty and just cause, since the dissolution of an alliance concluded between several states (princes) requires the consent of all the parties thereto. An ally may conclude a special treaty of peace (with a power hitherto hostile to the other parties of the alliance) only for specially important reasons; usually the right to conclude such a separate treaty of peace is denied by the terms of the treaty of alliance. In a general way, however, according to Textor's opinion, the difference between a *pactum personale* and a *pactum reale* must be taken into account, and he declares, furthermore, that self-preservation has precedence in law over the observance of an alliance. The other contracting party need not acquiesce in a merely partial fulfilment of an alliance which contains several stipulations (§ 16). Tacit renewal (continuation) of an alliance after the definite period of the alliance has expired is not admitted, unless a renewal in such tacit manner is especially stipulated. In conclusion, Textor again inquires if a change in the government of one of the contracting states effects the dissolution of an alliance.

Chapter XXVI, "*De jure neutralitatis*", displays a treatment of neutrality which is quite at variance with our present-day conception and which, in comparison with the simple and clear exposition given by Grotius (III, ch. 17), is retrograde and artificial. Textor considers neutrality as a concession by way of treaty made by a belligerent power; according to him each belligerent has the right, apart from such *consensus* (which may

also be given tacitly'), to compel every other state to withdraw from the status of friendship with the opponent, so that that state (by such friendship) may not harm the belligerent (*ne sibi in bello noceat*). On the other hand, it is deduced from this contractual nature of neutrality (referred to in § 13 as *pactum*) that no state may be compelled to observe neutrality (that is, that no state is bound by the *jus gentium* to remain neutral), and that neutrality, therefore, applies only to those states which are entitled to conclude treaties under the Law of Nations, and that to other states only a *promissio securitatis* can be given. Neutrality as a contract must be strictly interpreted; it can exist as regards one of several allied states without being observed as regards another of them. Neutrality consists in an impartial friendly relation toward both the one and the other of the belligerent parties (§ 2); a neutral state may not, therefore, concede more to the one than to the other (§ 4); and if a neutral state has already especially favored the one, it must upon demand show like favor to the other (to this extent it may exceptionally be, as Textor expresses it, "compelled to neutrality", § 13).

On the other hand, on the topic of contraband Textor expresses excellent views in sharp contrast with the most recent retrograde tendencies manifested at the Conference on the Law of Maritime Warfare, in 1908-1909. He says it is preposterous for us to wish to forbid a neutral state (a state with which we are living *in amicitia*) to furnish to our opponent such goods as are not of direct service in carrying on hostilities, merely to prevent our enemy from drawing a very trifling profit from his trade with the neutral state. Unfortunately, however, we meet again with an inconsistency here. While Textor does not consider the supply of grain and weapons as a breach of neutrality (§ 29)—even though they be supplied by the neutral state itself, for it matters not whether governments or private persons carry on such trade (§ 31), yet he holds that a belligerent may confiscate goods which are in transit to the enemy, when such goods, if not confiscated, would harm the confiscating party (§ 34). If, moreover, a

* Here the way is paved for a transition to the present-day conception of neutrality.

neutral state has itself need of certain goods, it may forbid their export without violating its neutrality.

It certainly seems strange to find Textor holding the view (cf. § 42) that it is lawful for both belligerents to fight on neutral territory, provided (a thing which is well-nigh impossible) such fighting does not result in injury to the neutral territory, "for (in and for itself) the (juridical) character of the locality does not deprive the belligerents of the use of weapons". Practically this declaration means that battles may not be fought within the towns of the neutral state but may be fought in the other parts of its territory. It is seen, therefore, that Textor has not a correct conception of the exclusive sovereignty of the state over its territory, and that at the same time he holds here an entirely impracticable view. Japan and Russia might, indeed, have appealed to Textor, when a few years ago they fought the bloodiest of battles within the territory of the neutral Chinese Empire, but there was in that case no lack of damage to the neutral territory and its inhabitants.

As a strict result of the view affirmed, a departure from neutrality is regarded (§§ 43, 44) as the dissolution of a contract or the declaration that it no longer binds: an essential change of conditions, in particular, hostile conduct of the belligerent state toward the neutral state, justifies the latter in giving up its neutrality.

Chapter XXVII, "*De juramentis*", deals with well-known principles concerning the validity and efficacy of promissory oaths. From the point of view of the Law of Nations this chapter is no longer of interest, and even in Textor's time scarcely any importance attached to the confirmation of a treaty by an oath.

Chapter XXVIII, "*De jure victoris in victos eorumque bona*" (that is, about the right of the victor apart from the conclusion of peace), defines victory in this connection as being in every case attained when it is obvious that the opponent is unable to offer effectual resistance, a condition that may come about even without previous fighting. Here, as regards the rights of the victor, Textor considers in the first place the conditions subject to which the conquered gives in his submission. In case of unconditional surrender, the laws of humanity must, however, be observed. The victor certainly *may* punish those who have caused or

fomented the war, and in support of this Textor cites examples from antiquity; the victor may also dispose as he sees fit of all the property of the conquered; he must, however, spare edifices devoted to *Christian* worship, though not heathen temples; it would be better to destroy the latter. As the victor has an unrestricted right over all the property of the conquered state, he may enforce any claims possessed by it. The conquered (that is, a conquered prince) may, however, provided he is not a prisoner of the victor, regain all his property and sovereignty (that is, he may for that purpose wage a just war), if he has not given his assent to the loss of them.

Chapter XXIX, "*De rebellione gentium devictarum*", explains that the right of war (of a just war) belongs to conquered states if the "right of arms" is reserved to them. But even when this is not so, still the right to enact laws remains with the conquered people, and their rebellion may be justifiable if the victor grossly violates the conditions of their submission. Should the insurgent people be reconquered—even in that case Textor declares that mild measures should be adopted and that the victor should be satisfied with the infliction of the death penalty upon *a few* of the rebels. Here, also, actual circumstances are not sufficiently considered and therefore Textor's conclusions must be considered as wholly antiquated.

The last Chapter (XXX), "*De modis quibus imperium extinguitur aut vacat et jure ordinum in regno vacante*", deals mainly with questions relating to the vacancy of a throne, especially when occasioned by the extinction of the dynasty, questions which belong to internal constitutional law, and relate in particular to the special conditions existing in the German Empire of Textor's time (§§ 54-57). Of international interest are those of his conclusions only which relate to a complete or partial alienation of territory. Because the prince can be regarded as a usufructuary only, he may not alienate his territory without the consent of his people; not even in case of necessity may the whole (that is, the remaining part of the state) alienate a part thereof, as Textor strangely remarks, because as between equals (one part as against the other) there is no power of alienation. It is different, he says,

with regard to subjugated peoples, especially when the separation does not make their lot worse. As free men, vassals may not be alienated without their consent (*absolute*) ; all the same their treatment has often been inconsistent with this. We can not regard these latter views either as satisfying or as indicative of progress, based as they are upon mistaken ingenuity.

LUDWIG VON BAR.

Göttingen, June, 1913.

Synopsis of the Law of Nations

BY

JOHANN WOLFGANG TEXTOR

*Jurisconsult and Principal Professor of Law
in the University of the Palatine Electorate, and Electoral Councillor*

Basel

At the charges of Johann Michael Rüdiger

From the press of Jacob Bertsch

1680

GREETINGS TO THE READER.

Some gentle reader may possibly look askance at this Synopsis of the Law of Nations, thinking that a topic so difficult were best left alone; nay, that private persons ought not to be allowed to deal with any of these State affairs, peace-making, treaties, and all that kind of business. And in this view they will obtain especial support from those who would have all Public Law eliminated and banished and exterminated out of our university courses, on the ground that this branch of learning should be the monopoly of statesmen and of royal or princely chancelleries. What a sad mistake such thinkers make, is, however, clearly shown by the very nature of the case; for the science of any department of conduct has precedence over practice, and no minister of State or ambassador or councillor, who is intent on the proper discharge of his future duties, can afford to omit, as a preliminary to his active work, a full acquaintance, such as assiduous industry alone can procure, with the particular branch of knowledge in question, if he is to attain the highest level in the execution of his public trusts.

It may be retorted that the Law under consideration can be learned in practice, not in the schools. I pity the practice if it be divorced from Reason, which is the especial and venerable source of all Law, whether public or private; such practice is the master of fools, to borrow from Livy the saying of Fabius Maximus. Reason, although its application varies with varying circumstances, is itself immutable; and, it being a gift of God, the infinitely Good and Great, to all mankind and not to any limited group of men, but implanted in the minds of all, it would indeed be an invidious thing for any particular class, on the strength of practice, to claim as a special appanage of their own caste that knowledge of the Law of Nations which is a product of Reason, and, so far as in them lies, to bar the approach of others to this shrine.

Further, if knowledge of the Law of Nations is to be gauged and acquired solely by practice, what provision will be made for the supply of material, seeing that, even in the whole of our life, but few opportunities have arisen for considering such matters? History,

assuredly, provides a more abundant crop for the Law of Nations than the years of even the oldest individual, considering that a certain part of these is taken up by infancy and another claimed by youth, while early manhood renders the part on which it seizes useless, and, as to the remainder of the course, the inherent shortness of human life limits and confines it to a few cases. Moreover, there is a distinction to be drawn between Fact, the indefinite recurrence of which is all that Usage shows, and Right, which is the dictate of Natural Reason. Practice undoubtedly completes theory, yet by itself it can only show that this or that has happened. Natural Reason, on the other hand, enquires whether a thing has been done rightly and in conformity with the legal standard which the more cultured races have, on solid principles, adopted. Reason will not impart more freely, nay not as freely, a knowledge of the Law of Nations to him who seeks a short-cut to it through practice, as to him who studies history and who accurately considers the various ancient and modern incidents of peace and war.

So far, kind reader, we have been freeing this our Synopsis from a preliminary objection; another remains with regard to our title and subject-matter. You will find matters dealt with, not only in the earlier chapters, which relate to the Law of Nature, such as marriage, alimony, and defense of oneself against violence, although our title makes mention only of the Law of Nations. Now I may, in the first place, invoke the authority of Grotius here; for in his book on the Law of Peace and War (topics of the Law of Nations) he mixed up and inserted much that belongs to the Law of Nature, so that I can share in any defense which he has. Then, secondly, we ought not to be over-scrupulous about including the Law of Nations under the Law of Nature and, on the other hand, about including the Law of Nature in the right sense under the Law of Nations: for the same Law that, by reference to its basis in principles of Natural Reason, is called Natural Law is, by reference to world-wide reception, called the Law of Nations, as we have shown in Chapters I and II of this Synopsis; and so the different names correspond to different principles. These different names I adopt, subject, however, to this very important distinction: that some rules have admittedly issued from Natural Reason alone, before there was any practice of nations (these are ascribed by other writers to what they call Simple Natural Reason), while other rules have issued from the imperative needs of humanity (these are com-

monly said to issue from Compound Natural Reason). The latter of these two kinds admits of change, but not the former; to emphasize this particularly is within the scope and aim of Grotius and of the other jurists who make the division in question. Then, thirdly, the larger part of my pages is concerned with, and composed of, the especial material of the Law of Nations; so I am within my rights in proposing to take the name of my treatise therefrom.

Now, kind reader, use this little work well; and if you light on any typographical errors, excuse the author, for he has himself seen only a very little of it in printer's proof. Farewell.

Heidelberg, August, 1680.

CHAPTER I.

Of the Law of Nations in General.

SUMMARY.

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| <ol style="list-style-type: none">1. Description of Law of Nations according to Roman Law.2. Its sources are Natural Reason and Usage of Nations.3, 4. Grotius' definition of Law of Nations given and considered.5. How anything is proved to be part of Law of Nations.6. Whether Grotius' definition is different from the Roman.7. Law of Nations as conceived by Grotius requires mutual obligation.8. How that matter stands according to the Roman conception.9. Various utterances of Roman jurists about Law of Nations.10, 11. Points of resemblance, and of difference between Law of Nations and Law of Nature.12. Comparison between Law of Nations and Public Law and Political Science. | <ol style="list-style-type: none">13. Examples of mixed questions of Law of Nations and Public Law.14. Difference between Law of Nations and Political Science not same as between it and Public Law.15. Modern Law of Nations can change.16. Positive Law can become Law of Nations.17, 22. Law of Nations developed by continuous usage, and how.18. Whether Law of Nations requires, in all its parts alike, the study of history or of all history.19. In doubtful cases historians declare Law of Nations; what recent historians to be commended.20, 21. What length of time, and what amount of usage, required to develop Law of Nations.23. How a change in Law of Nations is proved.24. Whether Law of Nations can issue in a written form without changing its character. |
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It is very necessary, in the forefront of this treatise, to consider carefully, before everything else, the nature of the Law of Nations in general. In popular Roman Law it seems to have been only sketchily described, as being, to wit, "the Law which all races of men use," as we know from Ulpian (*Dig.* I, I, I, 4). Gaius amplifies this definition a little in *Dig.* I, I, 9, where he says, "What its natural reasonableness has established among all men, is observed among all peoples alike and is called Law of Nations, as being the Law used by all nations." The Emperor Justinian has borrowed these words from Gaius, and has copied them with the same formal meaning (*Inst.*, I, 2, 1).

In these extracts two sources of the Law of Nations are indicated: (1) Reason, which, as the proximate efficient cause, dictates to the various nations that this or that is to be observed as Law among the human race; (2) the Usage of nations, or what has been in practice accepted as Law by the nations. There may be this Usage without Reason, or Reason without this Usage, and yet the matter shall be one of the Law of Nations; but not where both these requisites are wanting.

- 3 Hugo Grotius, a man of the most conspicuous merit in this branch of Law, puts out as a definition of the Law of Nations, that it is what has received obligatory force from the consent of all, or a great number of, nations. (See *De jure pacis ac belli*, bk. 1, ch. 1, n. 14.) Of this it may in the first place be remarked, that the consent of the greater number, especially of the more cultured, nations is enough; for suppose there were some nation so barbarous and wild as not to maintain any respect for agreements or laws, and to be almost outside the pale of all human intercourse (such as the Indians of the West seem to have been before the voyages of Columbus and for two hundred years, and as the inhabitants of the promontory of Africa called Of Good Hope are to-day), I can not affirm that, if there be a people so wild and inhumane as to live without Law, the Law of Nations, which Reason dictates and Usage affirms, is on that account any the less the Law of Nations. And undoubtedly a similar meaning must be given to what the Emperor Justinian and the jurists Ulpian and Gaius say in the passages already quoted, in which they declare the Law of Nations to be observed among all peoples alike, namely, that this is so among those peoples with whom the relations of human intercourse subsist. Further, as to Grotius' additional requirement in the aforementioned definition, that the Law in question has received its obligatory force from the consent of nations, that is, I think, in effect identical with the second source of the Law of Nations. And this for two reasons: first, because all Law, as such, carries with it binding force, Law in general being nothing but a dictate of Right Reason, obliging to its observance because of the authority and assent of its author and upholder; and so, in the foregoing definitions where the nature of the Law of Nations is portrayed, an obligation of the kind which the Grotians call for can not but be included. And my second reason is, that the adoption of this Law in practice indicates the assent of nations thereto, their assent not being everywhere declared in express writing, but in conduct and usage also, in such sort that when they employ this or that law in their affairs, they must mean it to be binding.
- 5 This assertion is indeed so evident that Grotius himself is not against it, teaching, as he rightly does, in the passage mentioned, that the Law of Nations is proved by Usage and the testimony of experts. Now, while experts can testify about that Reason which dictates the Law of Nations, Usage declares the tacit assent of peoples; and these two are what I named as the authentic sources of the Law of Nations.
- 6 This makes it clear that Grotius' definition of the Law of Nations differs in words only, and not in reality, from that which we have taken from the Roman Law. One point, however, remains—and some importance is attached to it—namely, that Grotius, when unfolding the inner nature of the Law of Nations, is not content with an obligatory force dependent on the assent of nations, but requires also that this assent shall be mutual. (See his *De jure belli ac pacis*, bk. 2, ch. 3, n. 5; and bk. 3, ch. 1, n. 8.)

Accordingly, we must state Grotius' view as being that a Law of Nations 7 is impossible without this mutual obligation, contained in a pact, too, and even although the matter has been dictated by reason and received as Law by nations; for, says he, this would rather be an extension of the Civil Law of divers States, such as they can individually abolish. And Pufendorf's opinion is almost identical, *De jure naturæ et gentium*, bk. 2, ch. 3, § 22, where he says that many matters which Roman jurists and others refer to the Law of Nations—such, for instance, as concern modes of acquisition, contracts, etc.—really belong to the Law of Nature or to the Civil Law of individual States, and this just because of that very want of agreement or mutual obligation; it being, he continues, a mere accident that the lawmakers of the different States are at one on the points in question. Hence Selden also (*De mare clauso*, bk. 1, ch. 3) asserts that the kind of Law under consideration is improperly called Law of Nations; and he will not so style it absolutely, but only with an addition, namely, the Domestic Law of Nations.

However that may be, the insistence on agreement and mutual obliga- 8 tion is no ground for distinguishing between the Grotian definition of the Law of Nations and that of the Roman lawyers. For, in the first place, the agreement so creative of mutual obligation need not be an express agreement; but a tacit agreement suffices, such as can be deduced from the usage of nations, according to what has already been said. And in the second place, in the Roman definition of the Law of Nations, the nations who use that Law are spoken of indeterminately; and so the Usage which may be taken to be the basis of the assent of nations can no more be limited to the citizens of some one State than can the assent of nations which, in the Grotian definition, is the source of the Law's obligatory force, for this latter also rests similarly on an indeterminate foundation and lacks the express quality of a mutual obligation. The law of postliminy is an illustration hereof; and so, too, the law of treaty-making, although it reposes to some extent on the mutual obligation of States, reposes also on mutual usage, as Pomponius and Proculus testify (*Dig.* 40, 15: 5 (1) and 7). Similar cases admit of the same treatment; and so there is obviously no inconsistency in applying the same principles of interpretation to the mutual usage of this Law by States and their citizens as Grotius applied to the express assent of a mutual obligation.

Nor does the assertion avail that this was not the interpretation given 9 by the Roman jurists and others, seeing that they refer to the Law of Nations many quite extraneous matters, especially such as concern the modes of acquisition and contracts. For I reply with Grotius (n. 8, above cited) that the term Law of Nations is used in more than one sense; and, if the Roman jurists refer a matter to it which is quite extraneous in one of its senses, it does not follow that it is extraneous thereto in another of its senses. This is admitted by Grotius in the place referred to and will be made clearer in the following chapter.

- 10 Meanwhile, it is evident from the foregoing that the Law of Nations has very much in common with the Law of Nature and with Public Law and Political Science, while on the other hand differing from each in some one or other of its significations. Indeed, as regards it and the Law of Nature, both have a common origin in the Natural Reason which is implanted in us and which is nothing else than the Practical Intelligence directed towards moral principles, in the light of which men, whether individuals or nations, can see what conduct, as being honest and just, is to be adopted for the better ordering of life, and what, on the other hand, as dishonest and unjust, is to be avoided.
- 11 This is the common ground of the Law of Nations and the Law of Nature. They differ, however, in the manner of their development; for the Law of Nature issues direct from Natural Reason, whereas the Law of Nations issues through the medium of international usage, upon which the varying conditions and relations of human life have exercised a preëminent influence. The Emperor Justinian makes the same statement in *Inst.*, bk. 1, tit. 2, § 2. But, as will appear in the next chapter, this difference emerges only when the diverse significations of the Law of Nature and the Law of Nations are taken into account, for the Civil Law draws a definite distinction between the two as regards acts and things, Ulpian, followed by Justinian (*Inst.* 1, 2, pr.), regarding the Law of Nature as something shared by brutes, and the Law of Nations as confined to human relations, a distinction not recognized by Grotius and modern writers on the Law of Nations. (See the next chapter.)
- 12 Again, the Law of Nations is akin to Public Law and Politics, some of its special topics being matters of the Prerogative, like war, peace, treaties, etc., which are the concern also of Public Law and Politics, although in diverse fashion, there being this difference between the two cases, namely, that the Law of Nations deals with the sovereign rights in question generally, and in what is called a didactic manner, whereas Public Law deals with them in active exercise, and with a limited reference to some particular State. For example, when the topic is defensive treaties in themselves, and their requisites and effects, the question belongs to the Law of Nations, while the consideration of the legalities of such a treaty in the Romano-Germanic Empire belongs to Public Law, and so on in similar cases.
- 13 It often happens, however, that questions of this kind are mixed and involve principles both of Public Law and of the Law of Nations; and this is so, indeed, whenever in interstate business a discussion arises about public authority, owing to one of the parties to the transaction challenging the extent thereof. The well-known Caudine Peace may serve as an example. A keen dispute arose in olden days between Samnites and Romans about its validity, the Samnites upholding it as valid because entered into on behalf of the State by the Roman consuls Spurius and Veturius, while the Romans denied its validity because made without the authorization of the Roman people, who were at that time the depositaries of sovereignty in the Roman State. Another example is furnished by the dispute between the Roman ambassadors

and the senators of Carthage about the Peace of Hamilcar, the point at issue being whether the State of Carthage was or was not bound by it. And to the same category belong present-day questions about treaties entered into by the States of the Empire and about their neutrality and other such like.

Now the difference which we have remarked between the Law of ¹⁴ Nations and Public Law does not equally exist between Public Law and Politics; for, while this latter science also deals with matters of Prerogative in a general and unrestricted sense, yet there are other respects in which the two differ one from the other. Statesmanship does not focus itself on the legal obligation, as the Law of Nations does, but on the weal of the State, asking whether it is at the present time expedient to make war against these or those enemies or to make peace with them. Now they who, in affairs of this kind, are skilled to devise courses of profit for their King or Prince are called *Politici*, or masters of statecraft, and the happiest situation of public policy is when ministers of State are able to combine the attainment of justice for the interests of the State with the display of statesmanship and sagacity. And here a further difference can be traced. For statesmanship professedly regulates the State and its component parts, namely, the societies of husband and wife, of parents and children, of masters and servants, out of which the State is enucleated, and at the same time indicates the forms of States, such as Monarchy, Aristocracy, Democracy, etc.—on which Polybius discourses neatly (*History*, bk. 6). The Law of Nations, on the other hand, does not similarly deal with these matters, but presupposes in interstate affairs a definite form of State on either side.

From what has been thus laid down, a few corollaries may be deduced. ¹⁵
(1) New matter can be introduced into the present-day Law of Nations and the old Law be gradually altered by a newer Law. For this Law has been shown to be strictly Customary and founded on the Usage of States; and, therefore, just as a more modern civil custom corrects a more ancient one if at variance with it (*Dig.* 1, 3, 32), so a more modern Custom of Nations—for the principle is the same—must be allowed to displace a more ancient one, so far as the two are inconsistent with each other. This is especially so in view of the frequent mutations of human life, in which Right Reason finds the justification of dictating now one and now another law to States. Thus, for example, the enslaving of captives, which in wars of earlier times was rightly introduced, has become obsolete under the milder usages of Christian peoples; and so on.

Nay, it is not ridiculous to allege that matters of Positive Civil Law may ¹⁶ become part of the Law of Nations, provided that the usage of nations adds a mutually obligatory consent thereto. Of this an almost contemporaneous illustration is furnished by the *Corpus juris* of Justinian, which has so penetrated the customs of diverse peoples that we resort to it, alike between citizens and with foreigners, as the normal standard for the settlement of

disputes, at any rate where there are no special rules of kingdoms and provinces to the contrary.

17 (2) It may be gathered that the Law of Nations was not developed out of hand by one or two operations, but over a long period and by continued usage. So Grotius also holds, place named, n. 14, where he commends historians for devoting considerable labor to the unfolding of the Law of Nations, an opinion which must be taken to refer wholly to the doubtful points of the Law of Nations in connection with which we have recourse to the usage of past times, as is similarly done in connection with doubtful points of Positive Law (*Dig.* 1, 3, 37).

18 But where the Law of Nations is clear and unmistakable, it will be superfluous to refer to history; for there is no room for conjecture in clear cases (text and commentators, *Dig.* 34, 2, 32, 2), such as that postliminy is an operative principle, or that a successor on the throne is bound by a peace made by his predecessor, or that ambassadors are inviolable. In such-like cases there is no need to vouch antiquity to proof, for they are self-evident.

19 Further, in cases of doubt, when we get little aid and light in ascertaining the Law of Nations from ancient historians because they are at variance and discord one with another, it is right and proper to emphasize the more modern usage of nations, inasmuch as, all other things being equal, it (as we have just said) overrides ancient Law; and for this purpose the histories of Guicciardini, Sleidanus and Auguste de Thou are, I think, to be commended, and also the *Acta publica* of Lundorp, the *Diarium Europaeum*, and such-like writings, wherein are set down the doings of Kings and peoples as regards congresses, wars, pacifications, and treaties, with their causes and details.

20 But here a difficult question emerges, namely, what amount of time and usage is needed in order to beget a Law of Nations out of the usage of Kings and peoples. This same question is seen to arise about custom in civil matters, where some authorities require two acts and others more, at the discretion of the judge, and where some require ten years and others a longer time still, and some leave it, as in any other undecided case, to the discretion of the judge —which last-named opinion is that usually held by modern authorities. (See Menochio, *De arbitrariis judicum questionibus*, bk. 2, cent. 1, cas. 81, n. 4, and cas. 83, n. 6.) But ours is a harder matter still to determine, because judges are not provided between Kings and peoples who acknowledge no superior. How, then, shall the doubt be resolved? My view, in brief, is that if all or most peoples, even once only, have adopted a given course of conduct, any period or interval of time is enough for the introduction of a Law of Nations in that particular; and therefore that while, absolutely, a number of acts are required, proportionate to the number of peoples involved, yet, relatively to individual peoples, a single act is enough. For example, if on one occasion only anything touching peace or treaties has been observed as binding, under the dictates of Reason, between the Romano-Germanic

Empire and the Turkish, between the Kings of Spain and France, between British and Dutch, between Swedes and Danes, etc., nothing hinders us from declaring it to be part of the Law of Nations.

Those instances are, accordingly, to be combined in order to erect a Law 22 of Nations; for otherwise the nature of this Law will be involved in inextricable difficulties, if we require each separate people, as well as the others, to have given a repeated display of the conduct in question. Accordingly it follows that the opinion of Grotius, mentioned a little bit above (namely, that the Law of Nations comes to be approved by continued usage), must be taken with a grain of salt—in such sort, indeed, that a uniform usage of all peoples, extending over several centuries or immemorial time, might have no claim to be approved as Law; while it may be enough to show a usage, conformable to sound Reason, on the part of all or the larger number of peoples, for its very character already raises a presumption that it is part of the Law of Nations, and he who asserts the contrary must bear the burden of proving a contrary usage of later date.

Nor is it enough, when a continuous prior usage of nations is admitted, 23 for him to show a contrary usage of one or another people in transactions between them; but he will not have proved that the Law of Nations is changed thereby, unless he has shown a consent to the contrary, on the part of all or the larger number of peoples, the fact being that, just as the Law of Nations does not originate with a few peoples, so also, when it has duly come into being, it is not annulled or altered by the contrary usage of a few peoples, according to the rule in *Dig.* 50, 17, 10, which is founded on natural reason.

Lastly, although, according to the premises, the Law of Nations is principally founded on the custom and observances of Kings and peoples, yet I would not absolutely assert that it is in its essence customary. I hold that peoples can also expressly agree that this or that shall be observed by the human race as Law among Kings and free peoples and their citizens and subjects, and this might well, in various circumstances, avert many occasions of dispute and of perversion of the Law of Nations. The world, however, has not yet beheld such common Law of Nations affirmed by express assent, and perhaps never will behold it, so great is the preference shown for settling the affairs of Kings and peoples by the sword and arms, rather than by equity and justice.

So much about the Law of Nations in general.

CHAPTER II.

Of the Division of the Law of Nations, and its Objects.

SUMMARY.

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| <ul style="list-style-type: none"> 1. The distinction of the Law of Nations into Primordial and Secondary, and the objections raised to this distinction. 2. The defense of this distinction. 3. The Law of Nations, in a certain sense, can be called the Law of Nature. 4–6. Further prosecution of this topic. 7, 8. The different meanings of the Law of Nature shown. 9. In what sense Aristotle, Grotius and the jurists speak of the Law of Nature. 10. Whether the difference between activities common to brutes and activities peculiar to men is vital in connection with the Law of Nature. | <ul style="list-style-type: none"> 11. Activities which issue from the sense-consciousness; which of them belong to the Law of Nature. 12, 13. Disproof of the objections raised against the aforementioned division of the Law of Nations. 14. The objects of the Primordial Law of Nations. 15. The objects of the Secondary Law of Nations. 16. Why the activities of the Law of Nature are dealt with here. |
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1 It is a common doctrine of the doctors, especially the early ones, that the Law of Nations is divided into the Primordial and the Secondary, the former of these consisting of material dictated by Reason, right away from the beginning of institutions, while the latter sprang up later in usage and the necessities of human life. But dissent from this doctrine is expressed by many of the more modern writers; for instance, by Connarus (*Commentaries*, bk. 1, ch. 5, nn. 3, 8) and by others whom Pinellus mentions (*De rescindenda venditione*, part 1, ch. 1, n. 12). These hold that what is called the Law of Nations of the Primordial kind is really Law Natural, and can not be rightly styled Law of Nations, inasmuch as it springs from Natural Reason and took its origin at a time when the human race had not yet been split up into nations. They further hold that it is incongruous to make times and ages the basis of a jural division, just as if it were contended that Civil Law is of two varieties, one Primordial and the other Secondary.

2 But these and the like reasonings have not enough weight to demolish without more the Primordial Law of Nations, nor utterly to overthrow the division in question, a division which, among moderns, Zasius (on *Dig.* 1, 1, n. 11, onwards), Biccarius (in *Justi Meyeri Collegium Argentoratense a se enucleatum*, n. 9 on *Dig.* 1, 1), Busius (nn. 2, 3 on *Dig.* 1, 1, 1, 4), and Frantzke (n. 121 on *Dig.* 1, 1, 1, 4) retain, although the last-named wavers again in the passage following that cited. Now the starting-point for the defense of this division is in this, that not only the Secondary, but also the Primordial,

Law of Nations shares as a matter of fact in the requisites of the Law of Nations which were laid down in the foregoing chapter; for it issues, by general admission, from Natural Right Reason and is accepted as Law by the usage of peoples. It is, therefore, true Law of Nations; and the Secondary Law of Nations being by universal assent also Law of Nations, that common division of the doctors holds its ground.

And it is no objection that the Primordial Law of Nations wears the guise of Natural Law in virtue of its descent from Naked (or, as some call it, Simple) Natural Reason, since there is no absurdity in styling the Law of Nations in its own sense Natural Law. Indeed, Aristotle (*Ethics*, bk. 5, ch. 6) makes only a twofold division of Law, the one part being *τὸ ἀπλῶς δίκαιον*, the Simply Right, or what we call the Law of Nature, and the other part being *τὸ πολιτικὸν δίκαιον*, or Civil Law: and, as Grotius (*De jure belli ac pacis*, bk. 1, ch. 1, n. 9) approves of this division as the best, I certainly see no reason for repudiating the Primordial Law of Nations in the fact that it is and may be styled, in its proper sense, Law of Nature; for it is a consequence of this twofold division that we are bound to include the Secondary Law of Nations also under the Law of Nature, because it can not be classed as Civil Law, being admittedly, and remaining, indubitable and genuine Law of Nations, utterly distinct, as Grotius himself concedes, from mere Civil Law. Hence Hobbes (*Fundamental Principles of Government and Society*, ch. 24) distinguishes Natural Law into the Natural Law of men and of States, the latter being what is commonly called the Law of Nations; and to this assertion our master Pufendorf subscribes (*De jure naturæ et gentium*, bk. 2, ch. 3, § 22).

This being so, the wrangle about the Primordial Law of Nations seems to become rather nominal than real; for the premises show that the assertors of the contrary view can not deny that there is a common concept under which both kinds of that Law, alike what we call the Primordial Law of Nations and what we call the Secondary, are directly included, while Civil or Positive Law is at the same time excluded. Whether, then, we label that general idea Law and Ordinance of Nature, because issuing from the root-principle of Natural Reason, and follow Hobbes in dividing it into the Natural Law of men and of States, or label it Law of Nations, as ordinarily deriving its principles from the practice of peoples, and follow the common opinion of jurists and divide it into Primordial and Secondary Law of Nations, it comes practically to the same thing, as is not obscurely hinted by Covarruvias (*Relaciones* on c. *peccatum*, part 2, § 11, n. 4, *De regulis juris*, in VI) and by Aug. Barbosa (on c. 9, dist. 1). The latter, after following others in n. 2 in setting out the different arguments against the Primordial Law of Nations, immediately submits in nn. 3, 4 that the Law of Nations is of a twofold character, the one part being what is properly called Natural, or absolutely ordained by Natural Reason, and the other being what is ordained, not by Natural Reason (in the absolute sense), but by peoples acting under the

stress of necessity. Now, what is this but to acknowledge that the Law of Nations and the Law of Nature are, and may be called, the same thing from different points of view?

- 7 And it makes no difference that, in *Dig.* 1, 1, 1, 4, a clear distinction is drawn between the Law of Nations and the Law of Nature, since it is authoritatively held that this Law of Nature is susceptible of more than one meaning. Thus, it is at times applied generally to all Law which issues from Right Natural Reason as distinguished from any positive legislative source; and this is the sense in which Aristotle uses it in his aforementioned division of Law in the widest sense of the word, for in that case all Law other than Positive is Natural Law—and this whether the name Law of Nature or Law of Nations is employed in the special case. Sometimes, again, the term Law of Nature is applied in a specific sense to that Law which issues from Natural Reason immediately and unconditionally, in contradistinction alike to Statutory or Positive Law and to the Law of Nations; for although this latter, too, has its source in Natural Reason, yet the connection is not immediate and unconditional, but arises after the event and relatively to the changing chances and needs of human life. Accordingly, Grotius (*De jure belli ac pacis*, ch. 1, beginning) uses the term Law of Nature in opposition to 8 Law of Nations, and so do his followers as a rule. Then, in a third and most specialized sense, the term Law of Nature signifies only that Law which Nature dictates about activities common to ourselves and the brutes. In this sense Covarruvias, (place named) used it, and before him Cardinal Torquemada (on the aforementioned c. 9, dist. 1); and this is its common meaning in Roman Law. So, although the Law of Nations in this third sense is not identical with the Law of Nature, in the sense which Ulpian gives to both terms in *Dig.* 1, 1, 1, 4, yet, as a matter of general understanding and in reference to the first of the three meanings, there is nothing to hinder us from speaking of the Law of Nations and of Nature as identical.
- 9 It is, then, clear that the jurisconsults' use of the term Law of Nature is more strict than that of Grotius, for he especially adopts the second of the meanings mentioned; and Grotius' use of the term is, in its turn, stricter than that of Aristotle. Now, the reason hereof is, that the jurisconsults divide the activities governed by the Law of Nature according to grades: one class is formed of those on the grade of sense and appetite and natural instinct, and so is found among living brutes also; but another class is formed of those on the grade of Reason alone, apart from any reference to the sense-nature. The latter class of activities are the object of the Law of Nations immediately, while the former are the object of the Law of Nature. As to the legitimacy of this distinction between varieties of activity, and the consequent erection of varieties of Law, I have no objection to make.
- 10 Grotius, indeed (work named, bk. 1, ch. 1, n. 11, towards end), argues that the question whether the activities with which the Law of Nature is concerned are common to us and the rest of animated creation, like the upbringing

of young, or are peculiar to us, like the worship of God, has no bearing upon the nature of the Law; but he will pardon a contrary opinion, for who is there but knows that faculties and qualities take their complexion from the objects with which they deal, and from the special attributes thereof? If, then, the activities which form (as it were) the objects of the Law of Nature in its wider meaning are not of one character, but are various in kind; and if, as regards one variety of object, we act (and rightly) in accordance with the instincts of our sense-nature, and as regards other varieties in other ways: why is it not, on that ground, entirely permissible to distinguish that as Law of Nature which is essentially and preëminently so, in that it is dictated to men both by Reason and by Natural Instinct; namely, what the jurisconsults call the Law of Nature? Now this Law is commonly styled Natural because it issues from Natural Reason, not because it issues from the instincts of our sense-nature.

It is, however, to be here remarked, that the natural instincts must be 11 subject to the dictates of Right Reason, in such sort that a man who acts in obedience to such an instinct behaves rightly, and conformably to the Law of Nature. Hence, there are not promiscuously included under this Law all activities which issue from the appetites and sense-instincts, but those only in which there is an element of right and wrong, of honest and base. For those which are merely natural—like sitting, standing, running, sleeping, and waking—have no place among the objects of the Law of Nature; and much less still can activities of the vegetable grade, like nutrition and growth, be ranked there.

After this discussion, it is easy to answer the arguments adduced above 12 against the Primordial Law of Nations. For, in the first place, it has been made clear that the same Law is, and may with soundness be, called both Law of Nations and Law of Nature. Then, secondly, we reply that there is no impropriety in the Primordial Law of Nations being Law of Nations and yet taking its rise before mankind split into nations, because it is in virtue of the approbation it has received, and not in virtue of its origin, that it is Law of Nations. It is this approbation by assenting peoples which has really given it obligatory force, although it was already binding under the dictates of Reason; and so it is this which has endowed it with the quality of Law of Nations, or rather has superadded that quality to the simple Law of Nature. In just this fashion the Civil Law is sometimes the source of an institution which, in regard of this approbation, may be ascribed to the Prætorian Law; for example, *Bonorum possessio ex lege*, according to *Dig.* 38, 14.

Now as touching the third objection it presupposes that the division of 13 the Law of Nations into Primordial and Secondary rests only on a question of differing antiquity. This is a false hypothesis; for, although the names suggest that, the actual case is not so. The Primordial Law of Nations comes from Natural Reason simply, but the Secondary from considerations of the condition and needs of human life—a distinction which some indicate by

saying that the Primordial originates in Simple Natural Reason, but the Secondary in Compound Natural Reason.

So far about the division of the Law of Nations.

- 14 Let us now enquire briefly, and by way of summary, into its objects. These, so far as regards the Primordial Law of Nations, which is called Natural in the Grotian sense, are clearly twofold, some being shared with the brutes, like the union of male and female, the procreation and upbringing of offspring, and self-defense against violence; while some are peculiar to men, like dutifulness to God, respect to parents, ownership and its varieties, original acquisition, and obligations arising from human contracts and agreements.
- 15 Those objects, however, which must be allocated to the Secondary Law of Nations, simply so called by Grotius, are very numerous—as the grouping of the human race into various nations, the origin of kingdoms, their boundaries and the modes of acquiring them, war, peace, truces, treaties, embassies, captivities, slavery, manumission, postliminy, the laws of neutrality, victories, other public conventions and agreements between Kings and Princes and Free States about such matters as trade, customs-dues, produce, and other business. These and similar matters are mentioned by Ulpian in *Dig.* 1, 1, 1, 4, and by Hermogenian in *Dig.* 1, 1, 1, 5; also by Gratian in c. 9, dist. 1; but in these passages the activities in question are jumbled up promiscuously, both those of the Primordial and those of the Secondary Law of Nations, a blemish much criticised by modern writers as attributing to the
- 16 Law of Nations matters which belong rather to the Law of Nature. Further, although the activities shared by us with the brutes belong to the Law of Nature, not only in the opinion of Grotius but also in that of the jurists, so that they might be reckoned outside the present treatise, which is described as being on the Law of Nations, yet I have thought they ought not to be omitted, either as coming within the wider meaning of the term Law of Nations or, at least, as having a close connection with (though some may think they should be entirely separated from) the other activities of the Law of Nations. And so, without further beating the bush, we will pass on to the specific cases and deal in order with the activities in question, and others like them.

CHAPTER III.

On the Law of Marriage.

SUMMARY.

1. The activities of the Law of Nature are of a twofold kind.
2. The reason of Marriage as an institute of the Law of Nature.
- 3, 4. A problem, and its solution.
5. Mankind's instinct towards the conjugal relation implanted by God.
6. The four requisites of Marriage under the Law of Nature and of Nations.
7. Sodomy repugnant to the Law of Nature; its punishment.
8. In the Law of Nature no determinate age of puberty; otherwise in the Civil Law.
9. Varying age of puberty in different nations, corresponding to differences in country and climate.
10. The sovereign can alter the age of marriage, and can grant dispensations to persons who are marriageable before it.
- 11-13. The marriage of old men and women, which the *Lex Julia Papia* formerly forbade in a certain fashion: whether it is allowed by the Law of Nature.
14. The faculty of generation not absolutely required by the Law of Nature for marriage.
15. Natural impotence an obstacle to marriage.
16. Matrimonial consent set out.
17. The agreements spoken of in c. 7, X. 4, 5 prevent matrimonial consent.
18. The hired wives of Saracens are wives in name only, but really whores.
19. To what extent Divorce is permitted by the Law of Nature or of Nations.
20. Under the word *πορνεία* (fornication), as used by our Savior Christ, wrongful desertion is included.
21. Practice concerning separation of spouses.
22. Whether the grounds given in the Law of Theodosius are sufficiently cogent under the Law of Nature.
- 23, 24. Whether the separation of spouses from bed and board is, or is not, consistent with the Law of Nature.
- 25-27. Whether the dissolution of marriage by mutual consent is permitted by the Law of Nature.
- 28-38. Whether Polygamy is, or is not, repugnant to the Law of Nature.
- 39-42. Whether, by the Law of Nature or of Nations, the consent of parents is necessary to the marriage of their children.
43. What marriages in the direct line are incestuous.
- 44-49. Whether, by the Law of Nature or of Nations, marriages in the direct line are indefinitely forbidden.
50. To what extent marriages among collaterals are disallowed by the Law of Nature and of Nations.
- 51, 52. Whether cases of marriage forbidden by the Positive Divine Law are dispensable.
- 53-55. What about marriages in the second or third kind of affinity among persons in the relation of parents and children?

The activities which are dictated to men by Natural Reason and the instincts of nature at the same time, are of a twofold kind, correspondent to the double end which Nature has in view for them; for they tend to the preservation either of the human race or of the individual man. Activities of the former kind are the union of male and female and the procreation and upbringing of offspring. For, as individual men are mortal, the Most Wise Architect, God, the infinitely Good and Great, has planned the birth of new men to repair the wastage of the dead, so that the species may not fail, and to that end has instituted the union of male and female which we call Marriage, the virtue of which it is to attain that end.

- 3 And if any one objects that, according to Holy Writ (*Genesis*, ch. 1, vv. 27, 28), marriage was instituted while man was still in a state of innocence, and that, as there was no death in that state, it is incorrect to say that marriage aims at the preservation of the species or at the rescue of the human race from death, and that it rather aims at the simple multiplication thereof in accordance with the precept "Increase and multiply," in v. 28, to such a person the answer must be that, even if we assume the immortality of man in the state of innocence, the eyes of Divine Providence are too clear to see only things present, and that so this institution of marriage, which, in its primal design and in regard of the state of innocence, would not have been required in order to balance the death of individuals, was yet required for this purpose in its secondary design and in regard of the fallen state which the Omnipotent Creator, in His infinite Wisdom, foresaw would immediately ensue.
- 5 Accordingly, lest men should either forthwith omit the procreation of offspring or should put on one side and neglect the issue they had begotten, the Divine Wisdom provided for this, partly by the instinct of man towards conjugal union and partly by the natural love of children which we call *στροφή*. That instinct of man towards things amorous needs not any incitement, but rather a check; and, when inordinate and excessive, it agrees not with the Divine Law. Yet it is designed by God for a good end, namely, the propagation of the human race.
- 6 Among the second group of activities—that, namely, which tends to the preservation of the individual—is self-defense against violence, of which later in its place, our topic in this chapter being Wedlock or Marriage in its relation to the Law of Nature or of Nations. In that regard there are four requisites to marriage; namely, Sex, Puberty, Consent of the contracting parties, and Probity of the union—Sex, because marriage is a union of man and woman, and so all similar intercourse between persons of the same sex is detestable to the Law of Nature and of Nations, as it is to the Divine Law; and is directly foreign to the end of marriage, inasmuch as no reproduction can thence result.
- 7 In the same way, and for the same reason, we must deal with the abominable intercourse of mankind with brutes and that foul defilement which is commonly called Sodomy, although in the Roman Law abuses between males are classed under the common name *stuprum* (*Dig.* 49, 5:9 (pr.) and 35(1)). Sodomy was punishable with the sword under the *Lex Julia de adulteriis* (*Cod.* 9, 9, 30). But the Constitution of Charles V, art. 116, rightly vindicates the Divine Law here with severity and makes burning alive the penalty of this heinous offense.
- 8 Again, Puberty, or capable age, is required by the Law of Nature for marriage, inasmuch as in its absence the postulated end can not be attained. The Law of Nature does not define the age at which puberty is reached; but by the civil laws fourteen completed years are held to suffice for marriage in

the case of a male, and twelve in the case of a female. This age, however, 9 is much too early for Europeans, especially those of the North, so that the Emperor Justinian (*Nov. 100, c. 2*) ruled that marriages in the fifteenth year were premature. But in the case of other peoples, especially the Indians and their neighbors, this age may well be somewhat too late if what is told of them be true, namely, that in those quarters of the world, owing to the warmth of the climate, both males and females contract marriage very early indeed. (See van Linschotten, *Icones et habitus Indorum*, part 2, ch. 36.) In this there is nothing repugnant to the Law of Nature, provided that both parties are at the time capable by reason of an actual puberty; so that in those cases which our author alludes to, where the woman, who is already allotted as a wife, only becomes marriageable later on by increase in age, the union which has thus been hastened on before due age can not, because of the non-attainment of the end of marriage, be considered to be true marriage by the Law of Nature.

It follows that, when the marriageable age has been fixed by Positive 10 Law, the sovereign can either repeal that law by fixing another age, having regard to the kind of country and climate and the earlier or later physical development of the inhabitants, or can dispense from that law for good reason, as where the trickery of the parties makes up for the want of age, in which case the issue of the union would be legitimate, the Law of Nature imposing no obstacle to such marriage and the sovereign having, according to the hypothesis, removed the hindrance set up by the Civil Law.

But what about the marriages of old men and old women? These 11 seem, indeed, to be void by the Law of Nature upon the same principle, namely, the absence of the prime end of marriage, which is the begetting of children. And so the old *Lex Julia Papia* forbade men over sixty and women over fifty to contract marriage. But in point of fact, no precise time is known at which the power of procreation ceases; indeed, cases of the procreation of children in old age are not rare. So it is better to say that old men are not forbidden to marry by the Law of Nature, especially as there is the secondary end of marriage to consider, namely, the avoidance of harlotry and the mutual rendering of help and comfort. This led Justinian to repeal the *Lex Julia* 12 *Papia* and to sanction the marriage of old men (*Cod. 5, 4, 27*). Accordingly, there is no hindrance to the marriage of old men unless, with Petrus Barbosa (part 1, l. 1, n. 94 on *Dig. 24, 3*) and Antonio Pérez (in commentary on *Cod. 5, 4*, end of n. 8), we make an exception in the case of the extremely 13 aged—provided, that is, the old men are so affected that none of the ends of marriage can be attained in their case. What we have said must then be taken, not as of absolute application to old age, but as applicable to the combination of old age and a certain bodily condition. And if there be a man who, even in extreme old age, is sufficiently hale and hearty in mind and body—such as Holy Writ tells us that Caleb was at a hundred and twenty, or as Masanissa, the Numidian King, was, who is recorded as raising issue in his

eighty-sixth year—what hindrance is imposed, either by the Law of Nature and of Nations or by the Civil Law, on such a man's entrance on marriage? This suffices to support our statement that, all other things being equal, the
 14 Law of Nature does not forbid the marriage of old men. And the marriage even of eunuchs is allowed (*Inst.* 1, 11, 9; *Dig.* 23, 3, 39, 1).

15 But this does not hold good of those who are entirely frigid or those of either sex who are clearly impotent (c. 2 and c. 3 and the whole title, *X.* 4, 15). See Paolo Zacchia, *Quæstiones medico-legales*, bk. 9, the whole of 5 and 6); for Natural Reason demonstrates this clearly, there being a total impediment to intercourse. And although the Pope (c. 4 and c. 5, *X.* 4, 15) draws a distinction according as there is or is not knowledge of the impediment, yet that distinction is hardly recognized in the Law of Nature and of Nations, because the knowledge and assent of the contracting parties can not make up the defect of a natural impediment.

16 The third chief requisite of the marriage-union under the Law of Nature is the Consent of the contracting parties—consent, namely, to that association in a conjugal life which marks off human marriage from brute unions. Now, that consent consists of two parts: first, a promise of the matrimonial intent and duty, and then a promise of cohabitation and undivided help and support. It is these things which mark Marriage off from Concubinage; and so they are of its essence, in such a way that there can be
 17 no contrary bargain to dispense with them. On this is founded the rule correctly laid down by Pope Gregory IX (c. 7, *X.* 4, 5), that a marriage-contract is made void by the addition of any such bargain or condition which is repugnant to its essence, such as “provided you avoid pregnancy,” “until I meet with another woman of higher rank and better endowments,” or “provided you surrender yourself to prostitution.” Clear reasons for this rule and for the Papal decree are furnished by the Law of Nature; for the addition of such a compact clearly shows that the parties gave no true matrimonial consent, since a man who obtains access to a woman in such a way treats her as a whore and not as a wife.

18 Accordingly, the Saracens' wives of olden days, who were hired with money and for limited periods (see Ammianus Marcellinus, bk. 19, ch. 3), were wives in name only, and in reality were whores and concubines; and the same is to be said of the women of the Chinese merchants who were bought or hired during the times when they were transacting business with Goa in India.

19 Having stated our opinion on this point, we come now to a variety of moot points.

(1) Whether Divorce is allowed by the Law of Nature and of Nations. My answer is unambiguous; for either there is present a just cause in the violation or desertion of the conjugal bed, in which case I answer Yes, or no such cause is present, and then I answer No. The ground of my first answer is, that the Law of Nature and of Nations does not compel any one to observe

a compact which the other party thereto has already broken, and so it is scandalous for a man to call for the enforcement of the conjugal bond who has violated conjugal good-faith by adultery or desertion. The ground of my second answer is, that the rights obtained by the contract of marriage are not taken away from a party against his will without just cause. Now, that is just what would happen if divorce were permitted without a cause of the kind named. Hence Christ's general condemnation of divorce save for fornication (*πορνεία*), in *Matthew*, ch. 5, v. 32, and ch. 19, v. 9; and in *Luke*, ch. 16, v. 18. Under this it is justifiable for us to include malicious desertion, both 20 because it smacks of a kind of presumptive adultery and also because such a desertion, involving a withdrawal from the conjugal duty and from cohabitation, constitutes in itself a breach of matrimonial good-faith; and in support hereof the passage of the Apostle (*1 Corinthians*, ch. 7, v. 15) may be cited. And on either of these grounds, namely, adultery or malicious desertion, a 21 consummated marriage may be dissolved to-day by a magistrate who is fully competent, the dissolution being from the bond (*a vinculo*) in the consistories of Protestant Kings, Princes and States, but less full and only from bed and board (*a toro ac mensa*) in Papal countries.

Many other grounds are allowed by the Emperors Theodosius and Valentinian (*Cod.* 5, 17, 8: 2 and 3). They can not, however, be deduced 22 from the principles of the Law of Nature and of Nations with the same certainty as the two grounds mentioned; and they are not recognized at the present time, except that some of them, like excessive cruelty towards a spouse or plotting against his or her life, are a ground for separation from bed and board (c. 8, X. 2, 13 and the canonists thereon), and some, like murder, are a ground for claiming the dissolution of a mere betrothal, where there has been no consummation (*Carpzov, Jurisprudentia consistorialis*, part 2, tit. 10, def. 177, the whole, and some of the following ones).

Question (2) relates to separation from bed and board. Its origin is of 23 positive Papal Law, but it is clearly not repugnant to the Law of Nature and of Nations; for, as the grounds on which this separation is granted (we here except altogether adultery and malicious desertion) are obviously insufficient for obtaining a dissolution of the bond, and as there is still a hope that through the interposition of magisterial authority the married pair may later on come into accord with one another, as is often seen to happen, reason itself dictates that their union should not be dissolved, but that for a while, because of the threatening danger and to avoid a worse evil, conjugal duty and cohabitation should in practice be suspended by a decree, such provision being made about aliment as the circumstances call for. This decree will never have the force 24 of a final judgment such as would prevent the judge from issuing a counter-decree if the situation warranted it, as, for instance, if he saw that a husband formerly guilty of cruelty had become of a milder disposition or that the old bitterness had been laid to rest; and the judge could then order the spouses to cohabit again. And there is no doubt, also, that the spouses thus separated

could of their own motion again cohabit (by inference from *Dig.* 23, 2, 33), although it would be safer and more authoritative for them to testify this new intent before a judge.

(3) My third question is, Whether the Law of Nature and of Nations allows a marriage to be dissolved by the common consent of the spouses. The answer Yes would seem to be suggested by the fact that marriage, between capable parties, is contracted by mere consent (c. 2, C. 27, qu. 2), and so it might be said that mere consent would dissolve it (*Dig.* 50, 17, 35). And this was doubtless the reasoning employed by the old Romans, who allowed divorce and repudiation with the good-will and mutual assent of the parties (*Dig.* 24, 2, 6; and *Cod.* 5, 17, 9); and although Justinian (*Nov.* 117, 10) repealed that law, yet his successor on the throne, Justin the Younger, brought back the old rule which allowed divorce by mutual assent (*Nov.* 140—that this Novel is Justin's, Cujas rightly points out, and the details about the time of enactment show it). However this may be, the negative answer to the above-mentioned question is sounder; namely, that the Law of Nature and of Nations does not allow the parties to a marriage to dissolve it by mutual assent. For (i) matrimonial consent under the Law of Nature is given to a union for a whole life, and not to a partnership which is inherently dissoluble. (ii) It is public policy to keep down the number of divorces and repudiations, alike in the interests of children which are prejudiced by the divorce of parents (and this is the really effective reason against the argument that dissent should avail to unmake what consent has made; see *Cod.* 5, 17, 8, pr.) and also in order to avoid the quarrels and bitterness which divorce so often breeds among citizens. And (iii) there is the argument from inconvenience. For, if Titius is in love with the wife of Sempronius, and Sempronius with the wife of Titius, a satisfaction of this illicit love could be secured in each case through a dissolution by consent of the existing marriages and the entry on new ones. Now this is not to be tolerated, else what God has joined man would be wantonly putting asunder, and loose lusts would be kindled and furnished with facile avenues, and the matrimonial union would degenerate into a kind of barter. So we do not adopt the Law of Justin (*Nov.* aforementioned), not even as applicable to the dissolution of betrothals. (See Henningus Arnisæus, *De jure connubii*, ch. 6, § 3, n. 14; Beust, *De sponsalibus*, part 1, ch. 58; Carpzov, *Jurisprudentia consistorialis*, bk. 2, tit. 10, def. 173, nn. 5, 6.)

(4) My next principal question is, Whether Polygamy is, or is not, allowed by the Law of Nature. Now, I hold most decidedly, with the learned Pufendorf (*De jure naturæ et gentium*, bk. 6, ch. 1, p. 775), that Polygamy is unlawful by the Law of Nature and of Nations; and in so doing I put aside the contrary examples of some peoples, and treat as exploded, also, the Platonic and any other similar communion of wives. I do so chiefly for two reasons: (1) Because such a wife is hardly distinguishable from a whore, being covered with the same smirch; and (2) Because the issue have an

uncertain origin and, while each of the fathers is unable to love such offspring in the same way as his own, the child is, so to say, defrauded of the natural love of his second parent.

But on the other hand, it is not equally clear that plurality of wives is in 29 itself repugnant to the Law of Nature and of Nations. Pufendorf, indeed (work named, p. 778, onwards), weighs the arguments on one side and on the other, but he leaves the decision in the hands of his readers, except that on p. 782, § 19, he declares for the marriage of one person with one person as the best and seemliest and completest. Hugo Grotius (*De jure belli ac pacis*, 30 bk. 2, ch. 5, §§ 8, 9) seems to incline to the negative doctrine, holding that this variety of polygamy is not discountenanced by the Law of Nature. The learned Ziegler, in his notes on that passage of Grotius, dissents from it on the ground that the obligation is reciprocal, binding the husband to one wife just as the wife is bound to one husband. I fear, however, that this reasoning widens the controversy; for there are some who deny that this variety of polygamy is forbidden by the Law of Nature; and these persons deny, also, that the same standard is to be applied under the Law of Nature to the matrimonial obligations of husband and of wife, especially in view of the principal end of marriage, the procreation of offspring, as is made abundantly clear by what the learned Puffendorf (work named) has brought together. However this may be, the discordant doctors seem to agree that Monogamy, as the nearest approach to the likeness of the primitive Divine institution, is the completest and best variety of marriage, and from this assertion Grotius does not dissociate himself (work named). But it does not thence follow that the polygamy of the Old Testament, which was practised by the patriarchs and holy kings and many other peoples, is absolutely repugnant to the Law of Nature and of Nations as a thing unlawful and disgraceful in itself.

Menochio (*De arbitrariis judicum questionibus*, cent. 2, cas. 420, 31 nn. 46, 27) outdoes others in his efforts to show, by a respectable array of argument, that plurality of wives is repugnant to the Law of Nature, but his reasoning is to a great extent upset by Sanchez (*De matrimonio disputatio*, lit. 7, 80, n. 6). If, now, we examine this matter a little more closely, we find three opinions about it: one opinion absolutely denies that polygamy is opposed to the Law of Nature; the second as absolutely asserts that it is; while the third distinguishes between the primary principles of the Law of Nature and the conclusions which are deduced from them, and holds that, although such plurality is not opposed to the principles of the Law of Nature or to the primary design of Nature in marriage, yet it is in point of fact contrary to the conclusions drawn from the Law of Nature and the secondary end of marriage. (See Covarruvias, *De matrimonio*, part 2, ch. 7, § 3, nn. 1, 2; and Sanchez, *De matrimonio disputatio*, 80 and 81, where these opinions are assigned to their authors.)

- 32 Not very much is required by way of proof of the first part of this last-named opinion; for the chief aim of marriage is the procreation of offspring, to which a plurality of wives is not such a hindrance as is the intercourse of one woman with several men. Accordingly, a matrimonial union with several women does not offend against the primary aim of marriage, as is granted even by Menochio (*De arbitrariis*, etc., cas. 420, nn. 57, 58), who is accordingly misplaced by Sanchez (place named, n. 6) when placed among the supporters of the second opinion. And because it is not opposed to the chief aim of the Law of Nature in marriage, it is not, in itself and directly, opposed to the prime principles of the Law of Nature in relation to marriage; for these are
 33 regulated by reference to the end which is in view. On this ground Covarruvias (n. 2, aforesaid) concludes that for one man to have more than one wife is not against Natural Law proper but, as he puts it, against the quasi-Law of Nature.

Now let us look at the foundations on which he depends for that opinion which marks off the second part from the first.

- (1) It is alleged that plurality of wives is inconsistent with the tranquil and peaceful cohabitation of the spouses and with the regulation of the household, which is a secondary aim of marriage according to Aristotle (*Ethics*, bk. 8, ch. 9). But the premise can be denied; for conjugal cohabitation is not hindered, in itself and directly, by one man's having more wives than one, as we see in the case of the Turks and other peoples who practise polygamy. Nay, the individual wives are all the more sedulous in their attentions to their husband in proportion to the keenness of their competition for his love, an
 34 anxiety from which wives are exempt in a system of monogamy. It is not, then, to be feared that discords will on that account arise, to the detriment of peaceful cohabitation—except maybe among the women themselves, between whom there is no tie of marriage, for that is only between them individually and the man. And as to this, can not the individual men, in virtue of the lordship (though not ownership) which they have over their wives, entrust the economic control to some one of them whom they find more prudent than the rest, and forbid quarrels, and impose a well-deserved punishment on the wife who starts them? And may it not be that the dispositions of the wives will be given a bent towards concord by such a display of control and course of conduct? Or, if we entirely adopt the view of Sanchez (place named, n. 8, at *neque id per accidens*) and despair of such an outcome, ought a marriage to be any the less marriage by the Law of Nature, because it is especially liable to quarrels? Would not that amount to making the characters of women the standard of the Law of Nature?

(2) The supporters of the doctrine under examination also give prominence to the following argument: They allege that the passions of the numerous wives are fatal to that form of polygamy, and therefore that it is in this further and other respect prejudicial to the secondary aim of marriage. But the answer is, that the premise is a mere accident due to an excessive

incontinence, and that a man can look after himself both in regard of how many and of what kind he marries. And a second answer consists in a denial 35 of the conclusion; for the paramount obligation which is imposed on man by considerations of the end of marriage is to attain the prime end of marriage, but no further, as Sanchez himself perceives (n. 26, aforesaid, in answer to argument (1)). Any further gratification is sinful—either mortal sin, according to Hostiensis (*Aurea summa*, tit. *de matrimonio*, § *quis sit effectus*, n. 23, at end), or venial sin, according to Sanchez (*De matrimonio*, bk. 9, disp. 11, n. 4). And even if we grant that, according to others, this is not 36 sinful, still the conclusion of the argument may be challenged on the ground that, by means of this variety of polygamy, a greater good in respect of the primary end compensates for a lesser evil in respect of the secondary end, especially when the wife has become pregnant, for in the meanwhile the man can have another lawful nuptial bed without the risk of injury to the offspring.

And (3) nought to the contrary can be argued from c. 8, X. 4, 19. In 37 that canon, either the dispensation in regard of plurality of wives could not be granted, because of a Divine law to the contrary, or the Pope was wrong in considering the case as one where a dispensation was impossible; anyhow, it is not indisputably forbidden by the Law of Nature and of Nations.

Since, then, as the foregoing argument shows, there is no obstacle to plurality of wives set up by the Law of Nature and of Nations in connection with the secondary end of marriage, it seems probable that he will not err who gives his assent to the first of the opinions enumerated above. But this must be taken as going no further than that plurality of wives does not make a marriage void under the Law of Nature; for, alike under the Civil Law (*Cod. 5, 5, 2*) and under the Canon Law (c. 8, X. 4, 19, and the like), and also under the Divine Law, according to the common and received interpretation thereof, this variety of polygamy of which we have been treating is also prohibited. (Barbosa, on c. 8, X. 4, 19, n. 10; Menochio, place named, 38 nn. 2, 35, onwards; Harpprecht on *Inst. I. 9, I, n. 32*, onwards; Carpzov, *Jurisprudentia consistorialis*, bk. 2, tit. 1, def. 3, n. 1, onwards.)

To say more on this matter is not part of my present plan. I give my adhesion to the received opinion, namely, that for the reasons mentioned, the variety of polygamy in question is not directly forbidden and null under the Law of Nature; yet I deem that monogamy is to be preferred, as being nearer the ideal and more conformable to the Divine ordinance and to the primitive state of innocence.

(5) A further question is, Whether, by the Law of Nature and of 39 Nations, the consent of parents is required to the marriage of their children. I should say that it is required to its satisfactory formation, but not to its formation simply, in such sort that without it the marriage of the child would be null by the Law of Nations. The reason for the first part of this opinion is, that filial duty convincingly asserts that in a matter so closely affecting the family the concurrence of the family-head is required; and this seems to have

been the principal basis of that argument from the nature of the case which is mentioned in *Inst.* 1, 10, pr. The reason for the second part of the opinion is, that under the Law of Nature and of Nations any man can bind himself by his own consent in any business whatsoever, provided he is of sound reason; therefore, under that Law a son is bound by his mere consent in contracting marriage. For Gaius' dictum (*Dig.* 44, 7, 39), that a son-under-power can in all cases be bound just like an independent person, is without doubt conformable to the Law of Nature and of Nations. Although, then, the Roman Law made an exception of the contract of marriage, and in it subjected sons to the consent of their parents, it does not, nevertheless, appear that this exception is to be imported into the Law of Nature and of Nations. (See Grotius, place named, § 10, at *solum autem*; also the learned Ludwell, n. 7 on *Inst.* 1, 10, pr.) This is so notwithstanding the passage *Inst.* 1, pr.: 41 “For both Civil and Natural Reason teach that this conduct is due.” And the reason is, that a distinction must, with Grotius, be drawn between the duty of a son and the essentials of marriage. Natural Reason does indeed teach that the father's consent is necessary to the marriage of his son; and so 42 does Civil Reason also, but in contemplation of a different end and result. For Natural Reason fastens on the duty of the son, which he can not properly perform without asking the consent of his father to his marriage; but this does not go to the essence of the marriage. It was the same in Holy Writ with Esau's marriage, contracted, as it was, without the consent of his father Israel; although that unduteous son acted badly herein, yet the marriage was undoubtedly valid. And that is the interpretation to be given to what is stated to be the received rule of the world, that the son should ask the father for his consent to his marriage. But Civil Reason, on the other hand, aims at both the end and the result mentioned, and so it differs from Natural Reason in the latter respect.

43 A fourth prime requisite of marriage remains, namely, the Probit of the union. This excludes marriages which, by the Law of Nature and of Nations are incestuous, such as between parents and children (*Dig.* 23, 2, 68), and also between relations by marriage who are in the line of ascent and descent, such as step-father and step-daughter, step-mother and step-son, father-in-law and daughter-in-law, and mother-in-law and son-in-law (*Dig.* 48, 5, 39 (pr., and 1)). Some Doctors, and especially the Papal, discuss whether that prohibition of marriage by the Law of Nature and of Nations between ascendants and descendants is to be understood as extending indefinitely, or only up to a certain degree of kinship. Some deny this indefinite operation of the rule, such as Veracruz (1 Part. *Speculum conjugiorum*, art. p. 3, last conclusion) and Covarruvias (*De matrimonio*, part 2, ch. 6, § 6, towards end). The latter says that this prohibition extends up to the twentieth degree. And see also Sanchez, *De matrimonio*, bk. 7, disp. 51, qu. 2, n. 13, and qu. 3, n. 19, where he brings together many other authorities.

The opposite opinion, however, is far sounder and better accredited, 45 namely, that this prohibition can not be confined by any law to any degree of kinship whatever; for, whatever subtleties Sanchez (n. 13, aforesaid) may revive to the contrary, the same natural principle of Law fights against the opinion in question, no matter what be the degree of kinship between the ascendant and the descendant, it being founded on the natural reverence of descendants for ascendants and on a horror of the union in question. And it is not true, as he thinks, that in the course of descent these objections lose their force because the community in blood is gradually lessened. A fine argument, this, in favor of an incestuous union! Where would be the decency of disallowing a marriage between Titius and his daughter and of allowing a marriage between him and her daughter because of the smaller degree of community of blood, so far as the Law of Nature is concerned, and thus enabling the woman to become her own mother's mother-in-law? And yet this argument is not good enough for Covarruvias and those who insist that the prohibition of marriage between ascendants and descendants is not, under the Law of Nature, of indefinite extent. Nevertheless, they grant that under that Law the prohibition goes further than the first degree (herein differing from Sanchez, passage cited), and that in consequence the marriage of a grandfather with his granddaughter is not permitted by the Law of Nature. They are, however, all faced by the same absurdity whenever they reach a point in the line of ascent and descent at which they say that the Law of Nature allows and excuses a marriage—nay, the number of degrees of distance rather accuses than excuses this unspeakable union in the direct line; for the older Titius is, and the more generations there are between him and his young descendant Seia, so much the greater reverence does she owe him, as Sylvester well says (see under the word *Matrimonium*, 8, qu. 6, at *Sed contrarium*); and so all the baser would be their union under the guise of marriage, seeing that it would make it impossible to avoid the wreck, on Titius' part, of the natural reverence due to so distant an ancestor, and, on Seia's part, of her respectful attitude towards one who has given up the honors owed to a great-great- or great-great-great-grandfather on his assuming the equality of a husband. And herein it must be remembered that that reverence of ancestors and that filial respect are clearly derived from the dictates of Right Reason and from the 47 Law of Nature, and also that in all probability, even in the infancy of the world, the patriarchs—who, according to Holy Writ, were exceedingly long-lived, their lives extending over many centuries—were the objects of great veneration to all their posterity, many degrees of which they would have been able to see. Now how, in that unspeakable kind of marriage, would it be possible to retain that veneration side by side with the equality of conjugal intimacy? Would not a marriage of this kind run counter in this feature to the Law of Nature and the dictates of Right Reason? Therefore, the Civil 48 Law (*Inst.* 1, 10, 1; *Dig.* 23, 2, 53) was most right in decreeing that ascendants and descendants, however remote, can not be joined in marriage, the

authority of which Law and the secular control of the matter Sanchez (passage aforementioned) vainly tries to destroy. And that opinion which I have so far been defending is admitted by writers of the weightiest order: the post-glossators, on the tree of consanguinity as set out in C. 35, qu. 5, and the glossators, on *Dig.* 23, 2, 53; Hostiensis (*Aurea summa*, tit. on Consanguinity, n. 9, and n. 17, qu. 9); Abbas, on c. 8, X. 4, 14, and thereon Præpositus (n. 10 on X. 4, 14); and the others given in Sanchez' long list (qu. 51, n. 12, aforementioned). To which may also be added Menochio (*De arbitrariis judicium questionibus et causis*, 502, n. 2); Tiraqueau (*De legibus connubialibus*, 7, n. 32); Vallensis, on c. 8, X. 4, 14, and thereon Henry Zoes, in his commentary on the Decretals, n. 6. Accordingly, that view, as being the one more commonly received, is to be adopted in this question of dispensations which arises in connection with the canon mentioned (c. 8, X. 4, 14)—the life of man being so short that the question can hardly arise except in connection with dispensations—which canon Sanchez and his adherents wrongly take to render marriages permissible between those outside the fourth degree, even where they are in the direct line of ascent and descent. (See Hostiensis, Abbas, Sylvester, and Zoes in the passages cited.) Let it then stand that such marriages are not permissible by any law, and that no dispensations can be granted in connection with them.

50 Next, what about marriages between collaterals? The more general doctrine is, that the Law of Nature only forbids marriage between collaterals in the first degree, like brothers and sisters; and this is the rule adopted by the more cultured peoples. This is the upshot of what is collected by Sanchez in the aforementioned bk. 7 (disp. 52, at *Tertia sententia*), and by Grotius (the aforementioned ch. 5, n. 14). Accordingly, any other prohibited degrees in the collateral line are so by Positive Divine Law (*Leviticus*, ch. 18) or by human Law, whether Civil, Canon or Provincial, etc. And I draw no distinction according as the brothers and sisters are of the half or of the whole blood; for the former, no less than the latter, will, on account of mutual modesty and in order to facilitate their being brought up together—and especially in order to remove opportunities of sin—be utterly unable to marry one another, even through the medium of a dispensation.

51 And what about the cases forbidden by Positive Divine Law but not by the Law of Nature? Can a dispensation be granted here in regard of marriage? Of a surety, no mortal can grant a valid dispensation from the Divine Law; but we are concerned with a case where Grotius (passage cited) asserts that the Supreme Lawgiver meant His Divine Law to apply not universally, but only to the Jews; and Cajetan (*On Secunda*, qu. 154, art. 9) was of the same opinion; and so is Sanchez (book aforementioned, disp. 52, n. 6, onwards). However that may be, since it is indubitable that there is a natural improbity in unions like those forbidden in *Leviticus*—as even Cajetan and Sanchez admit (passages cited)—such as all men ought certainly to avoid, it will be more correct to say that no dispensation can be granted in

cases within the express prohibitions of the Mosaic Law; for, although there is no universal prohibition laid down under the penalty of nullity of the marriage, still the prohibition is supported by a threat of punishment, as appears from the text, towards the end. (See Ziegler, *Observationes in Grotii De jure belli ac pacis*, passage cited, at the words *Nec difficilis est responsio.*)

My last question is, What is to be said about the second and third kind 53 of affinity between persons in the direct line? For example, Titius has a step-father who, after the death of Titius' mother, she being his first wife, marries Sempronia and then dies: can Titius and Sempronia then intermarry? —and so on in similar cases. My answer is, that although such marriages do not seem void by the Law of Nature, aye, and though Pope Innocent III, in c. 8, X. 4, 14, unmistakably removes the second kind of affinity such as exists in the example given, and also the third kind, from the list of impediments to marriage, and though on account of the generality of this canon it is taken to apply in the same way to a case where the question is about a marriage between persons in the second or third kinds of affinity in the direct line (see Zoes, passage cited, n. 9), yet I think it fitter to disallow such marriages (*Dig. 23, 2: 15* and *42, pr.*) in order to avoid public scandal. Certainly this 54 is so in cases of the second kind of affinity, in which the connection is much closer; and that is our law. (Carpzov, *Jurisprudentia consistorialis*, bk. 2, tit. 6, def. 101, n. 13.) And contraveners of that law deserve punishment, unless they have obtained a dispensation, according to Beust (*De sponsalibus*, ch. 3), or unless some local system has specially adopted that general disposition of the Canon Law about marriages between persons of the second kind of affinity in the direct line. Still, in every case I hold that the marriages in 55 question are not null in themselves, and that the issue of them is legitimate; and I think the same holds about the second kind of affinity in the collateral line, where marriage is prohibited on the same grounds of propriety. (Add Carpzov, *Jurisprudentia consistorialis*, bk. 2, tit. 6, def. 102, n. 4, onwards, and the theologians there cited.) Accordingly, where the first kind of affinity is a bar to marriage under the Law of Nature, the second kind must also, according to rule, be a bar in the interests of public propriety and the avoidance of scandal—not, indeed, so as to nullify the marriage, but as regards guilt and punishment. But marriages in the third kind must be permitted, the connection here being still more remote, although here too, according to Carpzov (aforenamed tit. 6, def. 103, nn. 8, 9), there must certainly be no neglect of the respect due to a father.

Having regard to the plan of the present treatise, this must suffice on the topics of this chapter.

CHAPTER IV.

On the Procreation and Education of Children.

SUMMARY.

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| <p>1. The object of marriage is the preservation of the human race.</p> <p>2. Whether one people is bound to join in marriage with another people.</p> <p>3. Rape of Sabine virgins by the Romans contrary to Law; and what about the precedent set by the Benjamites?</p> <p>4. By the Law of Nature and of Nations, when women thus seized give their consent subsequently, a valid marriage is created.</p> <p>5. It is the same in the Canon Law.</p> <p>6, 7. Whether the rights of inter-tribal marriages must rest on express Law.</p> <p>8, 9. Whether citizens can be compelled to marry, on considerations of public policy.</p> <p>10, 11. The Law of Nature shows the necessity of providing aliment and education.</p> <p>12. Whether the Law of Nature requires the provision of these even in the case of children born out of wedlock and from incestuous intercourse.</p> | <p>13, 14. What about the children of casual intercourse, and such as have no certain father?</p> <p>15, 16. Whether the Law of Nature requires children to provide aliment for their parents, and collaterals to provide for each other.</p> <p>17-19. In what order to arrange those persons who are bound to provide aliment.</p> <p>20, 21. How the due amount of aliment is to be determined.</p> <p>22. Up to what time it is due.</p> <p>23. The obligation of parents with regard to the education of their children.</p> <p>24-26. Whether parents are bound to furnish their children with the means of pursuing their studies.</p> <p>27. A wish concerning the education of children.</p> |
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I It is quite clear that the object of marriage is the preservation of the human race, which could not long endure if deaths were not continuously made good by births. Livy, writing in the first book of his History about the beginnings of the Roman State, chronicles that when the fortunes of Rome were so assured that it was the equal in arms of each of the neighboring States, yet the dearth of women was on the point of limiting the duration of its greatness to the span of a man's life, since there was no hope of children within its borders and no intermarriage with neighboring States; and this, says Livy, led to the rape of the Sabine virgins, because they were denied to the Romans when the Romans asked for them in marriage.

2 Here it is relevant to ask whether one people is, or is not, bound to join in marriage with another people. A reason for doubt on this point is derivable from the institution of marriage by God Himself; for, if the replenishment of the human race is, by the ordinance of God, the infinitely Good and Great, to take place through marriage, it seems as if one people can not rightfully refuse its women in marriage to another. Yet a far ampler justification for our decision is furnished by the elements of consent, which the All-wise Author of marriage, far from excluding, has included and presupposed in the institution

of marriage. Accordingly, just as no law compels an individual man and woman to marry each other apart from their consent, so also there is no compulsion on States to allow interstate marriages.

The Romans, therefore, in their rape of the Sabine virgins, acted wrong- 3 fully, whatever justice there may have been in Romulus' complaint that the refusal of the virgins in marriage was due to the haughtiness of their fathers. And the unions in question could not be classed as true marriages, at any rate before the virgins who had been so seized gave their assent. Nor is the rape of the virgins of Shiloh by the men of Benjamin to be cited as absolutely rightful, although rendered excusable by the facts that the rest of the tribes of Israel advised it and that, after the event, the victims probably assented to it. (See *Judges*, ch. 21, vv. 21-23.) Although the Sabine fathers only later on gave their concurrence, going to war with the captors of their daughters, yet their concurrence was evidently not required by the Law of Nations and of Nature, so far as concerns the substance of the marriage, as we have said above (preceding chapter).

Accordingly the Sabine victims of the rape, according to Livy (place 4 named), obviously deemed themselves the wives of their captors before obtaining their fathers' consent; so much so that, yielding to the inevitable, they interposed between the embattled hosts of their husbands and of their fathers. Ovid (*Fasti* 3) has a fine passage upon this:

Iam steterant acies ferro mortique paratae,
Iam lituus pugnæ signa datus erat,
Cum raptæ veniunt inter patresque virosque,
Inque sinu natos pignora chara tenent,
Vt medium campi scissis tetigere capillis,
In terram posito procubueret genu.

(The ranks had already taken up their position, ready for the sword and death, and the trumpet was on the point of giving the signal to fight, when the victims of the rape came between their fathers and their husbands, carrying in their bosoms their children, those dear pledges; when with rent locks they reached the center of the battle-field they bowed themselves to the earth upon their knees.)

And later:

Tela viris animique cadunt, gladiisque remotis,
Dant socii generis accipiuntque manus.

(Down drop both the weapons and the passions of the men and, with swords laid by, fathers-in-law and sons-in-law interchange hand-grips.)

But this occurrence must be viewed in connection only with the principles of the Law of Nature and of Nations and an older type of civil laws and customs; for by the later Roman Law no supervening consent on the woman's part removes the taint of a rape or establishes an honorable sort of marriage between ravisher and ravished (*Cod.* 9, 13, 1, 1). Whence it appears that 5 the Papal law which we traditionally follow in this matter, where, in the *Decretals* of Gregory IX (bk. 5, tit. 17, ch. 7), it allows marriage between

ravisher and ravished on the condition of subsequent uncoerced consent, is more conformable to the Law of Nature and of Nations. Clearly, the rights of inter-tribal marriages, although void of obligation in the absence of consent, do not require the support of any public agreement or constitution, as if, that is to say, persons of differing nationalities were, in the view of the Law of Nature and of Nations, incapable of contracting just wedlock unless some right of marriage were first expressly established between their nations by some public agreement or constitution. For capacity to marry springs from the Law of Nature; and, when the intent of the contracting parties is superadded, it passes into the bond of wedlock. This is the Law we accept; for Germans, Italians, Spaniards, Frenchmen, Danes, Portuguese, Swedes, British, Poles, Dutchmen, and others contract just matrimony with each other, and that without the enactment of any law and apart from the protection of any public agreement. Accordingly, enactments or agreements whereby marriages with some given nation are specially allowed either belong to the domain of treaties and alliances, such as, in olden days, were the arrangements between the Shechemites and the Children of Israel or between the Trojans and the Rutulians, or else they are made in view of the production of some effect in Civil Law, as was the case with that law of Theophilus, Emperor at Constantinople, which granted to the Persians permission to marry Romans, and which is to be found in the later collections of Imperial Constitutions under the title *De connubio Persarum cum Romanis*—for by Roman Law only Romans can contract *justæ nuptiæ* (*Inst. 1, 10, pr.*) so as, for example, to set up *patria potestas*. Theophilus' constitution, accordingly, took the Persians out of that rule, although the Law of Nature and of Nations has a rule allowing marriage between persons of different nationalities, provided there be so special rules of Public Law to the contrary—as there are with regard to marriages between Jews and Christians (*Cod. 1, 9, 6*) and between Christians and Turks or Saracens or Pagans, seeing that a prolonged sojourn among these is not allowed without peril to one's creed and blasphemy of the Creator (*X. 4, 19*, with the notes of the doctors thereon).

Now, the question arises, whether marriage can be enjoined on citizens by the public authority. I should say that it could on grounds of public policy, seeing that the neglect of marriage would, with lapse of time, deprive the State of its due number of citizens. It is in contemplation of this possibility that dowries are so favorably treated in the Civil Law (*Dig. 24, 3, 1* and similar passages). Accordingly Q. Metellus insisted, in olden days, that marriage should be compulsory on all, for the procreation of children; and at a later date, when Augustus Cæsar was putting his measure concerning the marriage of the different ranks before the Senate, he read Metellus' speech as if it had been written for that occasion, as may be seen in the summary of the contents of bk. 59 of Livy. Now, while the soundness of this view is less open to question in the case of the incontinent, who do better, according to the Apostle's teaching (*1 Corinthians, ch. 7*), to marry than to burn, yet in the

case of other persons it may be questioned on the ground that marriage ought to be free, and that therefore he who can live cleanly outside marriage should not be forced against his will to enter on that undivided life, as if it were a kind of slavery. Still, even as regards continent persons, it is better to answer the question in the affirmative; for although marriage is granted to be free as regards individuals—for example, as regards Seius' willingness or unwillingness to marry Seia—yet this is no obstacle to its being held necessary as a general proposition by the authority of the Law; and a bachelor has no just ground of complaint hereat, seeing that, if he prefers to live in a State which considers it important to keep up the number of its citizens, he ought either to submit to its laws and live a married life, if public policy requires, or else abjure his citizenship and go and live his bachelor life elsewhere.

So much, though little, about the first topic of this chapter.

Passing now to the second point, we see by Natural Reason the paramount character of the necessity and obligation that parents should educate their children; for Nature brings us into the world in a condition of utter need and void even of relative completeness, that is to say, unfitted then and there to take up the proper work of a man in this life. Accordingly, the supply of means of subsistence and a proper education are absolute necessities, since man can not live without them, or at any rate not live a man's life. And as we see other animals led by natural instinct to tend their offspring, so that they may thereafter live their life according to their kind, the principle is unmistakable which prompts and bids human parents, by a natural impulse, to undertake as a duty the care of their issue in matters of sustenance and education. Plato, accordingly, is quite right when he says, in his *Crito*, “Children ought not to have been begotten if the trouble of their upbringing and teaching is going to be shirked.”

Now the upbringing of man consists of two parts: (1) the supply of means of subsistence, and (2) the instruction of the mind; and each of them is obviously a necessary. As regards the supply of means of subsistence, three points call for consideration, under the Law of Nature: (1) persons, (2) amount, (3) time. The persons involved are parents and children reciprocally, the former, according to the natural principles just laid down, owing, and the latter being owed, the means of subsistence (*Dig.* 25, 3, 4, and thereon the doctors in general, and other books).

And this holds good not only of children born in lawful wedlock, but of illegitimate children, too, as the Civil Law also lays down (*Nov.* 89, 12, 6). Now, what about the issue of incestuous or adulterous intercourse? According to the Law of Nature the same thing must be said in their case, for the same principles are in operation, namely, that their father is responsible for their birth, and their needs are no whit less than those of legitimate children. These principles ought to have full recognition, and the fault of the father ought not to be a bar to the child's claim for support, despite the fact that the Civil Law, in its detestation of this illicit procreation, has a rule to the con-

trary (*Nov. 89, 15*). The canonists, in this matter, were more in harmony with the Law of Nature, not following the Civil Law, and rightly so (c. 5, X. 4, 7, towards end, and canonists thereon); and we clearly adopt their ruling in our Customary Law.

13 And what about the issue of casual intercourse who have no certain father? Beyond doubt, even these may claim means of subsistence from their mother—but how can they claim from a father who is uncertain? Well, I think they have a claim on him none the less. Uncertainty concerning the identity of the father of such a child does not release that father from the obligation to support it, which is imposed on him by the Law of Nature, although that uncertainty may render the claim unenforceable in any external forum. It may be interposed here, that when alimony and dowry were awarded by a court to a daughter similarly begotten, as reported by Vincent de Franchis (*Neapolitan Decisions*, 283, nn. 9, 18), the words used clearly refer to an illegitimate daughter begotten in an adulterous intercourse but by a certain father, since otherwise there could not have been any proceedings
14 brought against him. I am, however, inclined to favor the suggestion that a judge would do well to order the support of casually begotten children to be paid for proportionately by all the men who had access to the same whore—especially if she could not afford to pay for such support herself—on the analogy of a general punishment for crime where the individual perpetrator can not be ascertained (*Dig. 9, 2:11 (2)* and *51 (1)*; *9, 3:1 (10)* and *2*).

15 The converse question may also be put with regard to parents: Whether, under the Law of Nature, their children owe them support. Of course, the principle invoked above does not apply, for children are not the authors of their parents' being; but another principle replaces that one, namely, that the children have received their life from their parents in the sequence of Nature. From this point of view, it is most equitable that they should be bound to provide their parents with support; and the Roman Law adopts this (*Cod. 5, 25:1* and *2*. *Dig. 25, 3, 5 (13 and 16)*. *Nov. 117, 7*).

16 Now, this principle based on the giving or receiving of birth is inapplicable between collaterals; and so I hold that a brother is not bound by the Law of Nature to support a brother, nor a sister a sister, although from the standpoint of honor and of the close kinship between brothers and sisters it might be ruled otherwise where one has riches and the other has need; and this has the support of the Civil Law (by inference from *Dig. 27, 2, 4*; and *27, 3, 1, 1*; gloss on word *juste* in *Dig. 25, 3, 5*), and there is a usage to adopt it, but not in the case of collaterals further off than brothers and sisters (Vincent de Franchis, *Decisions*, 178, n. 10). Modestinus, accordingly (*Dig. 3, 2, 26, 1*), ruled that support given to a sister's daughter was given on the footing of natural piety, and that there was no legal obligation to give it, although when given to a person so related it can not be recovered (*Cod. 2, 18, 11*, and the like).

Now let us consider the order in which the aforementioned persons are bound by the Law of Nature to provide support. It is more probable that the burden falls first on the parents of those who are needing support, then on the children, and lastly on their brothers and sisters. For that obligation to provide support comes first which is derived from natural neediness, such as is the obligation of parents which is consequent on the procreation of children; then, second, comes the obligation of children which binds them, on the footing of reciprocity, to support the authors of their being; in the third place comes the obligation of brothers, dependent on honor and the call of the blood. Where there are more persons than one in the same line, the nearer should accept the burden of support, because the principle upon which support is claimable from that line falls more directly and forcibly upon him. Hence, in the ascending line, the father comes before the grandfather, and the grandfather before the great-grandfather; the son is bound to render support before the grandson; and the grandson before the great-grandson. But in the collateral line, inasmuch as the debt in question is limited to brothers and sisters, this question does not arise.

But what about the case where the competition is between father and mother? The father is under the prior obligation to provide support, according to the Civil Law (by inference from *Dig.* 25, 3, 5, 14); but the same can scarcely be affirmed of the simplicity of the Civil Law, since each of them is a party to the procreation of the child; this is the point which seems to have guided Pope Clement III in c. 5, X. 4, 7, towards end, although different interpretations are adopted by different persons.

There is much less ground for suggesting, with regard to other paternal ascendants, that they are under this obligation in priority to maternal ascendants, or even to the mother herself, as was held by Hostiensis (*Aurea summa*, tit. *de infantibus*, § *qui parentes*, n. 2) and by Carlo Ruini (*Consilia*, vol. 5, cons. 94, at *quoad quartum*). (Coler, *De alimentis*, bk. 1, ch. 8, n. 2, gives these references.) For all such rules as these must be attributed to Positive or Customary Law, either as incidental to the profits of paternal power or for other reasons which have no application to the case of a grandson, the natural son of a son; and so the obligation of providing support ought in Law to fall on the mother rather than on the paternal grandfather. I am here dealing only with the question of birthrights; for, if the grandfather, by having taken possession of the son's goods or by providing an opportunity and help for the son's departure, is responsible for the means of support being diverted from the grandson, then he can properly be summoned to supply such means to the natural grandson, even in priority to the mother, and a verdict could be equitably given against him on that score.

Next, the amount of the provision to be supplied is arbitrary, and must depend on the wealth of the person from whom it is due. Herein both the Civil and the Canon Law agree (*Dig.* 25, 3, 5 (10 and 4); *Cod.* 5, 25 (3 and 4); and c. 5, X. 4, 7, towards end). And it is quite in accord with the

Law of Nature, too, that our obligation with regard to support should be measured by our estate; we must not impoverish ourselves or suffer hunger thereby. The usual thing is, to leave the settlement of the amount to the Court: the judge will go into the circumstances and award a definite sum, taking into account what can be afforded (*Dig.* and *Cod.*, as above); and he should, moreover, pay regard to the resources of the child to whom the provision is due, asking whether it has any means of its own and whether it can earn its own living (*Dig.* 25, 3, 5, 7). Further, regard must be had in this matter to the rank of the persons concerned (by inference from *Dig.* 27, 6: 12 (3) and 13 (pr.)). This, however, I should treat as a matter for Positive Law or for the Secondary Law of Nations rather than for the Law of Nature properly so called, seeing that this Law takes no cognizance of differences of rank.

- 22 As for the time when this provision ought to be supplied, it is given in *Dig.* 34, 1, 14, pr., as continuing up to the eighteenth year for males, and up to the fourteenth year for females; but that is where there is a legacy of this sort of provision, which in the title in question is left up to the time of puberty. In the case of the provision which is due under the Law of Nature, it is sounder to say that it is due until the child can provide for itself or comes to possess means of support; nay, even if subsequently the child loses its resources, the same still holds good, and a provision will undoubtedly begin to be due to it.

This short consideration of the provision which is due under the Law of Nature must suffice. Any one wanting further information on the matter, especially as to when it is due by act of party, as under a contract or a will, can consult *Dig.* 2, 15, 8; *Cod.* 2, 4, 8; *Dig.* 34, 1; *Cod.* 5, 24 (both text and doctors); and also Coler and Surdus, in their treatises on Alimony.

- 23 It remains to consider mental instruction. Parents are bound to teach their children themselves or to have them taught by others the principles of religion, because without these they will lead no man's life at all, but rather a beast's; and godfathers, as they are called, take that on themselves in church, as regards the fundamentals of the Christian faith, to meet the chance that the parents are heedless of this duty or quit this life prematurely. There is a further obligation cast on parents to assign and accustom their sons to some fixed kind of life—study, soldiering or craftsmanship—so that they may thereafter provide necessary means of subsistence for themselves in an honorable manner; and as regards daughters, to instruct them or have them instructed, as is seemly, in womanly occupations.

- 24 The question then arises whether parents are bound to supply their sons with money for literary studies. I do not think this is any part of the Law of Nature or of Positive Law; for such studies clearly do not come under the term "means of subsistence" (*Dig.* 27, 2, 3, 5; 34, 1, 6; 37, 10, 6, 5. Angelus, *On Wills*, gloss 45, n. 6), although those parents are very praiseworthy who, for the advantage of their children—which redounds also to the good of the State itself—when they find them gifted, spare no expense in this

respect so far as their means allow. Nay, the doctors correctly lay it down that if such parents have furnished these costs over a space of years, they can be compelled by the Court to continue to do so—such a change in circumstances has thereby been set up (*Tulden, Commentaries on Code*, on tit. 5, 25, n. 2, towards end, where he says that he gave that opinion in the case of a certain law-student). I maintain my opinion as above, although some, 25 on the contrary, hold that the cost of student-life is included in the term “means of subsistence” (*alimenta*) (*Bartolus, Baldus* and other doctors on *Dig.* 37, 10, 6, 5; *Mynsinger, Centuriæ* 3, obs. 12). For *Tulden* (place named) rightly understands it as covering, not the more advanced studies, but only primary instruction in the elements of good-citizenship (the cost of which we have admitted that parents are bound to pay), or at any rate the rudiments of study; although it is undeniable that if a father has supplied his son, within reasonable limits, with means for studying, especially where the father was aware of the study, he can not recover such costs (*Cod.* 4, 28, 5). I should be reluctant, however, to follow *Suarez (Receptæ sententiaæ*, let. F, 26 n. 185) in applying this to the case in which the father had previously forbidden the expense of the study; for I do not see, in point of Law, any ground in such a case for an exception to the rule in *Cod.* 2, 18, 24.

Any one desiring more information about the privileges of studies and students should consult the doctors on *Dig.* 10, 2, 32; and on *Cod.* 2, 18, 24; and also on the Emperor Frederick's Constitution, *Habita* (*Cod.* 4, 13); and *Horatius Lucius*, in his treatise *De privatis scholis*.

In closing this chapter, I would add the wish that not only parents, but 27 those also who hold the keys of State, would treat the education of children as a solemn charge; for it is to the public weal that this should be sedulously looked to, if we would have the State equipped with strenuous, and not filled with slothful, citizens, with good and not with bad, with cultured and not with boorish. This education is, indeed, a matter of too great moment to be entrusted to men without parts or skill or industry; and herein the State has at times come to much hurt. (See *Diogenes Laërtius, On Aristotle*; and *Juvenal, Satires* 14.) *Plutarch*, in his book *On Education*, remarked with truth: Παιδείαν νόμιμον τῆς καλοκαγαθίας πηγὴν καὶ ρίζαν, “The training of youth is the source and root of excellence.” No more, however, about this topic.

CHAPTER V.

On Self-defense against Violence.

SUMMARY.

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| 1. How the natural instinct of self-defense manifests itself in animals.
2. What " <i>moderamen inculpatae tutela</i> " is.
3-6. How far self-defense against violence may, according to the jurists, be held a matter of the Law of Nature and of Nations.
7. The three requisites of the <i>moderamen inculpatae tutela</i> .
8. The aggressor can not treat it as punishable.
9. And what about an innocent third party, when our safety involves his hurt?
10, 11. The Divine Law allows such hurt.
12. If that hurt amounts to manslaughter, is there any, and if so, what, penalty?
13. Body, honors and goods are necessarily open to the defender's reprisals, but in different ways.
14-20. Whether, in warding off an assault made with cudgels and fists, the defender may lawfully kill his foe. | 21-24. Whether, and if so, within what limits, this is so in the case of wrongs of conduct ("real" wrongs) and verbal wrongs.
25, 26. Whether a person of rank may with impunity kill in order to avert an assault on him.
27. Duels not allowed by the Law of Nature.
28-33. Whether, and if so, within what limits, manslaughter is allowed in the defense of property.
34-37. Instances in excess of <i>moderamen inculpatae tutela</i> .
38, 39. Who may not resort to it.
40. The Law of Nature not only allows but also enjoins self-defense, even as far as killing the foe.
41. Suicide opposed to the Law of Nature.
42. In what cases suicide is lawful, or at any rate excusable. |
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1 The instinct to repel force by force is by nature one of our especial attributes; for, although God the Creator has implanted in all created things a quality which tends to their self-preservation and to the expulsion of whatever is inconsistent therewith (as Scotus shows by the testimony of experience in his *Commentary*, qu. 23, on Aristotle, *Physics*, bk. 1; and thereon Father de Pitigianis, of Arezzo, in his *Notes*), yet this is more definitely and unmistakably manifest in bodies which are endowed with perceptive and locomotive faculties; that is to say, in animals. For animals perceive through their senses the things which are hurtful to them; and then at once their appetite recoils therefrom as if from a natural enemy, and their natural structures set up the motion of resistance or of flight, according as their sense-organs reveal the object in question to the appetite in a more or less terrible guise. And in man, too, the passions and affections, such as love, fear, hate, etc., are ordinarily set going by the appearance of some similarly pleasing or distasteful object, on which point see Piccolomini, *Universa philosophia de moribus*, gradus 1, ch. 30.

2 Now, Natural Reason shows man whether and when and how far the appetite is to be indulged, especially (among other cases) in regard to our self-defense and that resistance by which we repel violence with violence even

to the hurt of the aggressor; and this dictate of Right Reason is that permitted self-defense which is commonly known as "*moderamen inculpatæ tutelæ*."

Before entering in detail upon this topic, it is well to ask why, and in what sense, defense against violence is ascribed in one place to the Law of Nations (*Dig.* 1, 1, 3), and in another to the Law of Nature (*Dig.* 43, 16, 1, 27; and 9, 1, 1, 11; *Canon Law*, dist. 1, c. 7). The answer would be easy if, in the texts cited, the term Law of Nature were used in Grotius' sense—that is to say, the Law which is dictated by Right Reason (a meaning which involves a distinction between the acts which are common to man and brutes and the acts which are peculiar to man)—for then self-defense against violence could be ascribed equally to the Law of Nature and to the Law of Nations; but the jurisconsults include the acts which are common to man and brutes in their definition of the Law of Nature, and draw, in the texts mentioned, a distinction between the Law of Nature and the Law of Nations. Accordingly, some other answer must be found; and we must say, with a glossator on *Dig.* 1, 1, 3, that warding off unlawful violence belongs to the Law of Nations, but warding off violence simply as violence, belongs to the Law of Nature, and that this latter alone concerns the brutes. Bartolus, in n. 5 on *Dig.* 1, 1, 3, falls foul of this gloss. He points out that, according to it, defense against any violence which is not strictly unlawful would not be permissible, as where the violence was employed by a madman or by a person who was mentally defective or who was asleep, etc.; and he says that, as this can not be admitted, he himself would draw the distinction differently, namely, between a defense conjoined with *moderamen inculpatæ tutelæ* and a defense in the simple sense of the word, the former belonging to the Law of Nations, as affecting men only, but the latter belonging to the Law of Nature, as affecting both men and brutes. Connarus (*Commentaries*, ch. 6, nn. 7, 9) thinks that defense against violence is not referred by the jurist, in the passage mentioned, to the Law of Nations, but to the Law of Nature; and Barbosa agrees with him (on dist. 1, c. 7). But I am afraid that the context does not admit of this. It is hardly likely that, when the preceding passage gives illustrations of the Law of Nations and then 1, 1, 3 follows in an unbroken verbal sequence, illustrations of a different kind should be added without any mark of contrast. Nor can I approve of the way, already mentioned, in which Bartolus draws the distinction, however many supporters he may have; because it is not a Law of Nations (in the sense in which the jurisconsults use that term) but a Law of Nature which is produced by the dictates of Right Reason so far as the acts common to us and brutes are concerned, although that Right Reason is a distinctively human attribute: and so defense against violence, even with the *moderamen inculpatæ tutelæ*, belongs in reality to the Law of Nature; for all Law—even that which, in its substance and as regards the acts affected, concerns brutes—issues from Reason, as was said above in its proper place. And just as marriage is and remains a matter of the Law of Nature, although

Right Reason dictates that the union of male and female in the human race must not be effected in a merely promiscuous manner, but by means of the bond of an undivided association—a bond which, originating in Reason, does not bind brutes together—so, in like manner, the same holds good of defense against violence together with the *moderamen inculpatæ tutelæ*, namely, that it, despite its origin in Reason, does not cause an alteration in the rank and character of the Law. Accordingly, I think it sounder to admit the propriety of distinguishing between two differing varieties of acts: in the one class defense against violence is shared with the brutes, and so belongs to the Law of Nature; while, in the other, defense is peculiar to man, and so belongs to the Law of Nations. For example, defense of property against violence is not shared with the brutes, nor is military defense of the State, for brutes do not live in Society. The same holds also of defense in matters of honor, which belongs to man alone, issuing from a dictate of Right Reason, and is therefore a matter of the Law of Nations; and so in other like cases. But that kind of defense which relates to the body and to bodily hurt is common to the brutes, and must therefore be classed in the Law of Nature.

With these prefatory remarks, let us pass on to the *moderamen inculpatæ tutelæ*. It involves three things: (i) an attack, that is, that some one is forcibly assailed by an enemy; (ii) an immediate danger resulting from that attack; (iii) the impossibility or, at any rate, the difficulty of escape. These elements issue from the dictate of Right Reason and are also conformable, without doubt, to Positive Law *Dig.* 1, 1, 3; 9, 2: 4 (pr.) and 45 (4); 48, 8, 1, 4; *Cod.* 9, 16, 2 and following laws; *X.* 5, 12, 16; *Constitutio criminalis* of Charles V, art. 140.

When all these requisites are present, defense is exempt from penalty in every kind of Law. (Texts just cited and Commentaries of Doctors thereon.) There is no doubt about this as regards defense against the assailant and his abettor, who may lawfully be killed, however illustrious their rank, without any violation of the *moderamen inculpatæ tutelæ*, as Mantua ruled in *Repet.*, n. 24, on *Dig.* 1, 1, 3, and Bolognetti thereon, n. 19. The same holds good in the case of a mad or sleeping assailant (Bartolus, n. 5, on *Dig.* 1, 1, 3; and Fulgosius on the same passage, n. 1; and the commentators just mentioned.)

There is more room for doubt when the question relates to a mediator or some other innocent third party and it is asked whether the killing of such an one can be classed under the *moderamen inculpatæ tutelæ*. Yet the affirmative answer is correct, according to the text in *Cod.* 9, 16, 2, the words *vel quemcunque alium*; and that was also the view taken by Julius Clarus in his book on *Crimina* (§ *homicidium*, n. 24, at *addo*), and by Antonio Gomez (*Variæ resolutiones*, vol. 3, rubric *De homicidio*, n. 34, at end, and n. 35), and by Farinacci (*Quæstiones variæ*, 125, p. 3, n. 139). And I do not think any other pronouncement is to be attributed to the Law of Nature and of Nations, because even in so extreme a case as this the Reason which

displays itself in Natural Law and in the accepted usages of the world causes that to be held lawful which is done in bodily defense. Yet the precept in the Divine Law about loving one's neighbor gives us pause; for if we are bound to love our neighbor as ourselves, how may we procure our own safety by killing him? And so there are some who hold the slayer of the third party to be guilty in the forum of conscience (*Curtius, Repet.*, n. 14, on *Dig.* 1, 1, 3, quoted by Farinacci, *Quæstiones variae*, 125, p. 3, n. 161).

All the same, it is sounder to say that even the Divine Law admits of self-defense under the *moderamen inculpatae tutelæ*, even up to the killing of an innocent third party, provided there be no other way of saving one's life; for such defense does not in itself involve any inordinate affection contrary to the Divine Law, seeing that in such case it is not within the defender's intent to kill a man, but either the wound is accidentally given or at any rate not in anger or lust of vengeance, but rather with a view to his own preservation, which that other party was jeopardizing, though undesignedly. Accordingly, if a mounted man, when escaping from an armed assailant who would kill him, rides down a boy whom he meets, he is not, properly speaking, guilty of the killing, not even in the forum of heaven; or if you kill a man who, without any evil intent, is trying with all his might to detain you against your will, and so you escape falling into the hands of a violent assailant who has been breathing out slaughter against you, there is no breach here of the fifth * commandment of the Decalogue or of our duty to love our neighbor as ourselves—but not above or in preference to ourselves. Nay, the defender in such case, as already said, has no ulterior affection to gratify by means of this killing; and therefore the killing in question will be lawful by Divine Law. The same, by parity of reasoning, applies where one kills a man in defense, not of his own life, but of some other innocent person's life.

Now the first of the three requisites just named must be understood to mean defensive killing without any fault; for where fault is present (as where the defender resorted to arms needlessly), the slaying of the third party is not unvisited by penalty. The reason hereof is clear enough, for the rashness and fault of the defender ought not to cause hurt to an innocent third party. This can also be gathered with tolerable certainty from the Civil Law, *Dig.* 9, 2, 45, 4, where Paulus says, "If, however, I have thrown a stone at an assailant and have missed him and hit a passer-by, I shall be liable under the Aquilian Law, for we are only allowed to strike a man who is attacking us," etc. Yet even here a distinction must be admitted between the criminal penalty for doing bodily hurt and the penalty of recompense in damages, the latter (whether ordinary or extraordinary), but not the former, being still exacted on the ground of the wrongful causing of loss in necessary defense; and that doubtless is how *Dig.* 9, 2, 45, 4 is to be interpreted, and is what was decided by Decio (n. 12, on *Dig.* 1, 1, 3), and Gomez on the same law, and Farinacci (*Quæstiones variae*, 125, p. 3, n. 141).

* In ordinary English reckoning, sixth.—Tr.

13 The second of the above-named requisites must be taken in different ways, according to the different objects concerned; for there are three objects of necessary defense: one's body, one's honor, and one's property. All these may be defended by force, but not all alike as far as manslaughter. Defense of the body is lawful even in this extreme way; but defense of honor and of property are not equally unrestricted, at any rate not as a general rule, as will appear from what follows. The reason of this diversity is, that in the latter cases it is preferable that the remedy should take the form of reparation given by a judge, but when life has once been taken, no judge can give it back. The same holds good in the case of a rape, killing being here permissible under the *moderamen inculpatæ tutelæ* (*Dig.* 48, 8, 1, 4). So also in the case of a forcible attempt to cut off a limb; for, if death is caused in warding this off, the killer is not liable, the act being lawful in defense of the body (*Dig.* 1, 1, 3).

14 What, however, of a defense against an assault with staves or fists? The doctors hold that here, too, the killing of the foe is permitted by common opinion, if there be no other way of escaping the blows of staves and fists (glossators and Baldus, n. 12, on *Cod.* 8, 4, 1, and Angelus thereon; Alexander, of Imola, vol. 1, consil. 76, n. 2, and vol. 7, consil. 119, n. 5; Carerius, *Practica causarum criminalium*, § *Homicidium*, n. 98). Farinacci (*Quæstiones variae* 125, n. 82) was also of the same opinion, although he seems to say otherwise in n. 86 and in nn. 357, 361; in the latter of these two places he gives his opinion with considerable emphasis. However this may be, it is by no means certain that the Law of Nature and of Nations support the opinion in question, nor is it beyond cavil in the forum of conscience. Nay, I would go so far as to say that it is not irrefragably shown to be part of the Civil Law, but rests on a very doubtful basis, namely, that it is in general permissible to kill in defense of honor and property, a matter to be dealt with shortly. And our assertion is proved by the fact that the measures of defense must be proportionate to the nature of the attack and to the degree in which there is a menace of deadly peril—35, X. 5, 39; Carpzov, *Practica rerum criminalium*, part 1, 28, nn. 23 and following, where he enquires into the matter, saying, “Not every attack is adequate to bring the *moderamen inculpatæ tutelæ* into operation, but only one which menaces with deadly peril such as the victim can not evade save by killing his foe.”

16 These words show that two requisites must be present in order that an attacked person may lawfully slay his assailant with *moderamen inculpatæ tutelæ*: (i) The attacked person must have been placed either actually in peril of life or in an equally bad situation, as the illustration about rape shows (*Dig.* 48, 8, 1, 2); and (ii) There must be no escape from that peril save by killing. These two requisites are parallel to the second and third requisite named above.

Now, in the case which we are dealing with, the first requisite is missing, because an assault with fists, in itself and absolutely speaking, can not be held either actually or by equivalence to constitute a deadly peril; for such an

assault either does not lead to this result or at any rate only rarely and quite accidentally. Accordingly, a defense may not in this instance go so far as to cause the death of the assailant; and I maintain the same about a beating with staves (German, *prügeln*). It does not move me that Carpzov (place named, 17 n. 26), following others, says, "If the assailant delivers his assault with fist only, or with empty hand, or with a staff, and the attacked person has no other weapon ready than a sword, he may well protect himself with that weapon, and in so doing will not be chargeable with going beyond the *moderamen inculpatæ tutelæ*"; for my answer is either that Carpzov is not dealing in this passage with a defense that goes as far as homicide, or else that, if, with Decio (on *Dig.* 1, 1, 3, note 31, at *sed tamen*), we take him to include permission to kill in permission to use arms in self-defense, he is contradicting himself and abandoning his former opinion without any assigned reason, and so his later pronouncement is not to be insisted on.

Briefly: by the rules of the Law of Nature and of Nations, the peril set up 18 by the infliction of blows with staves or fists does not justify the assaulted party in homicide on the footing of necessary and absolutely just defense, because of the grave disproportion between the measures of offense and the measures of defense; and I am ready to assert that this holds in the Law of heaven also and in the forum of conscience, in accordance with what Covarruvias has given us in his *Relectiones*, part 3, on the single chapter of the *Clementine Constitutions*, bk. 5, tit. 4, although he speaks with some hesitation in the same place, towards the end.

Our rule will, however, admit of an exception when the three requisites 19 are all present: namely, the assailant is of so powerful a frame that his assault with fists or staff will not improbably cause death (as in the case of that Pisan whom Bartolus, on *Dig.* 1, 1, 3, tells us of); secondly, the peril of such an attack by such an one is menacing the defender; thirdly, he can not escape in any other way. Then, and in that case, I hold that he is allowed by every Law to push his defense even up to homicide; for the manner in which a person's life is put in peril is immaterial, whether by his assailant's weapons, or by the might of his fist or naked hand, or by a bludgeon, especially if the person assailed be a feeble person (Bartolus, passage cited; Bolognetti, 16, n. 87, at *sed si adversarius*).

Further, an exception must also be admitted in the case where the 20 assailant tries to wrest the assailed person's sword from him; for the uncertainty as regards his safety in which this places him justifies him in defending himself by killing even an unarmed assailant, and the latter, in view of his own aggression, has only himself to blame, whether for his wounds or for his death which results therefrom.

Now we must consider more minutely the question of defending honor; and we see at once that a distinction must be drawn between a verbal outrage and an outrage by conduct. In the case of the former there is no room for the *moderamen inculpatæ tutelæ* as regards killing the offender; for other

measures of redress may be taken, either by an action for damages before a judge, or by the method of retorsion which is much resorted to to-day. And so, however grave be the insults perpetrated against you in words or in writing, you may not on that ground wound the author of them without incurring punishment; and much less may you kill him. But as regards outrages by conduct, they are not all of one kind; for some cast so serious a slur in the eyes of one's fellows that they can not be redressed in court or by any corresponding hurt done to the author.

21 In this latter class come, for example, adulteries and violations of wives or daughters. If there be an imminent danger of these, not only the victims, but also their husbands and fathers and relatives, may take measures of defense against forcible violators, even up to homicide, on the ground of the sullied honor—always provided there be no other way of avoiding it (*Dig.*

22 48, 8, 1, 4). And it makes no difference that women who have been made to yield to violence remain of unsullied honor in point of Law (text in *Cod.* 9, 9, 20); for none the less the assailant has besmirched maidenly or matronly honor, at any rate in common repute and in the eyes of men, a point which the Emperor Charles V seems to have taken into account in his *Constitutio criminalis*, art. 140.

Further, killing by way of defense is allowable in a case where a man, without actual intercourse, attempts by force to behave immodestly in public towards a maid or matron; for of a truth, if the defender wounds him with, say, a coulter or like instrument, or even kills him, the *moderamen inculpatæ tutelæ* is not overpassed so far as regards the requisite of imminent danger; and this right goes so far that it was seen at work even in the case of the ambassadors of Darius, King of the Persians, to Amyntas, King of Macedonia, when they made too free with the royal ladies, as told by Justinus (*History*, bk. 7, ch. 3). The justice of this treatment is, however, open to question, seeing that there was ample means of putting a stop to the misconduct of the Persian legates without killing them.

Now, there are some injuries by conduct which do not involve any serious insult, but an insult which is obviously reparable either by the Court or by act of party, such as a forcible breaking into a house, which is reckoned 23 as an outrage (*Dig.* 47, 10, 5, pr.). So also of an assault with staves or fists, a matter previously dealt with. The reason is, that the assailant can in his turn be fustigated and pommelled; and in so doing the party first assaulted is held in men's opinion to have adequately safeguarded his reputation, even if it be the case that, at the time of the first assault, he had no opportunity of so doing, and although he renders himself liable to an action for damages by this postponed recourse to force. Inasmuch as he, on his side, has the first aggressor under a legal bond, he assuredly incurs no disgrace such as is incurred in the cases mentioned above, and therefore no similar measures of defense even up to homicide ought to be allowed to him; for Natural Reason asserts itself in the former cases, since either life itself or an honorable and

unsullied life is endangered by the assailant's violence, or may easily be endangered.

It is accordingly clear that in this connection, when dealing with an assault with staves, I do not include an ignominious whipping, such as is inflicted by the executioner on those condemned to an extraordinary punishment. For, if this be forcibly attempted against a man of respectability by private persons or by a judge acting beyond his competence, I do not doubt that defense is legally permissible even up to the killing of his assailants.

What if he be a man of rank, and the other party tries to smack his head? A good many people think that defense is lawful in this case even up to killing, simply on the ground of the high rank of the man who, unless he defended himself, would get a smack on the head (following others, Farnacci, qu. 125; aforementioned, n. 322). But the opposite opinion is the correct one, for the same reason of want of proportion between offense and defense; and so also when the Law of Nature is considered (see Alberico da Rosate, n. 13, on *Dig.* 48, 8, 1, at end; *Cod.* 8, 4; and Leonhard Lessius, *De justitia et jure*, bk. 2, ch. 9, dub. 12, n. 80, where he at any rate prefers this opinion to the other as a practical matter). Nor will the opposite side be advanced by the doctrine of Grotius, *De jure belli ac pacis*, bk. 2, ch. 1, § 10, where he holds that, if a man prepares to assault me, that entitles me to use any and every measure which is necessary for warding off the blow; for, besides that the hypothesis is false (as Ziegler also shows, place named, in notes), the consequence drawn is weak, for I can safeguard my honor by hitting back either at once or after an interval, so long as I do not forthwith run my enemy through or mortally wound or kill him. This affair of injured honor (so called) allows of restitution or cancellation in its own appropriate manner, namely, in the opinion of men; and although, when this takes place after an interval, it seems less consistent with Law, yet it should be tolerated, since it contemplates a lesser evil than the killing of an enemy under the plea of self-defense. Aye, and there is a much better method still, namely, by recourse to the judge, who can compel the offender to make public apology or other amends, as is reputed to be ordained at the present day in France.

This shows how repugnant to Natural Law and Reason are private duels in which, with a perverted idea of wiping out an insult, men of rank and soldiers cross swords with one another. This corrupt custom ought everywhere to be repressed and entirely prohibited, as being in the highest degree harmful, by Kings and Princes and civil authorities, following the example recently set by the King of France. It is certainly permissible to hope that this will soon be the case in our Empire, if the decrees of the Estates in their present session about the prohibition of dueling be affirmed by the Emperor and if, when they have acquired the force and validity of Public Law, they be observed with no less care and solicitude throughout the territories of the Princes and States.

28 I now arrive at the topic of Property, in the defense of which many hold that the extremest measures of defense are permissible. This, indeed, seems to be a corollary of Grotius' principle, already set forth, and which Pufendorf labors to support (*De jure naturæ et gentium*, bk. 2, ch. 5, § 6). The expository sources of our Law, also, agree on the whole that defense of property may be pushed as far as the death of the assailant, if it can not be otherwise protected (*Cod.* 8, 4). This text, however, does not really go so far; it speaks of defense simply, and not of killing an assailant in defense. The idea that it would be futile to allow an armed defense unless even killing were permissible, does not rest on any logical basis, save where the defender's life or person is endangered, as is not seldom the case in a tussle arising out of the attack and defense of property.

29 There is more plausibility in the arguments adduced by Pufendorf, namely, that a man who deliberately plans an assault of any kind turns himself into an enemy and is rightly subjected to the very severest treatment; and that as much force may be resorted to in the defense of property as in the defense of life, since the assailant has no more right forcibly to deprive the owner of one than of the other; and that one who deprives another of his property robs him, in effect, of his life; and also that, unless force, even of the extremest kind, may be used in order to check plunderers of property, civil society can not subsist. I think, however, that it is a fair reply to say that an enemy, simply as such and viewed as between private citizens, may not unconditionally be killed with impunity, and therefore that the contrary hypothesis is false; for when, as the jurisconsult properly says, "Nature has established a kind of relationship between us which makes it wicked for one man to plot against his fellow" (*Cod.*, passage named), who would conclude that the Law of Nature admits the justice of killing one's fellow-man for the purpose of averting every conceivable wrong or injury—even a reparable one—to person or property?

31 That by the Secondary Law of Nations this killing is permissible between enemies, is a matter of public authority, which, for causes of a graver kind, where no other satisfaction is rendered, may by the common consent of nations decree the last remedy of war. In such a war, the citizens of either State and their allies, and their property, are lawful objects of attack alike by killing and by capture. If I, at such a time, may kill my enemy, it is not because he is directly and immediately injuring or about to injure me or my property, but the State, even though he keeps his hands off me (in my private capacity) and mine. We can not, then, allege a nice balancing of rights and wrongs as our warrant for killing an offender; for otherwise we could kill in order to ward off every wrong, however slight and reparable. It is even less true that property and life are to be paired with one another; for property can be regained or other property be acquired in lieu of it by the methods known to law, while with life it is quite a different story. There is, in short, adequate security for civil society and public tran-

quillity if the restraint of robbers be left to public, and not to private, discretion.

I accordingly hold that the Law of Nature on this matter is better represented by what Sylvester says in his *Summa*, on the word *homicidium*, (qu. 4), and Covarruvias (*Relectiones*, on the Clementine *si furiosus*, part 3, the single section, n. 5, line *contrarium*). In this opinion that in the defense 32 of property measures may not be pushed to the extremest and even to the death of the assailant, Ziegler also agrees (on Grotius, place cited, § 12). The Law of Nations must be held to be the same with regard to killing by private authority in defense of property, by parity of reasoning. The same also in the forum of conscience, according to the glossators on *C. 32*, qu. 2, c. 6; Panormitanus and others on c. 2, *X. 5, 12*; Jason, n. 27, on *Dig. 1, 1, 3*. And as regards the Canon Law also, the better opinion is, that killing in defense of property is not lawful in itself and directly (c. 3 and c. 10, *X. 5, 12*; Felinus, n. 4, on c. 2, *X. 5, 12*). There only remains, then, the Civil Law, according to a current interpretation of which the defense of property may be pushed to extremes and even to the killing of the assailant (see doctors on *Cod. 8, 4, 1*). But even of this Law the better opinion is, that killing in defense of property is not as a rule allowed, unless in the course of that defense the defender is put into peril of life or limb, as the text in *Dig. 48, 8, 9* seems to imply. Covarruvias and Decio weigh that text, and after a long discussion the latter draws the distinction named (n. 31, line *et concludendo*). So also Busius (n. 6, on *Dig. 9, 2, 5*) and Grotius, § 12, abovementioned, and Ziegler thereon. And the Criminal Constitution of the Emperor Charles, art. 140, abovementioned, is indistinguishable from this doctrine. For when the 33 Emperor is there pronouncing the permissibility of homicide in defense of life and honor under the *moderamen inculpæ tutelæ* (giving that phrase the meaning attributed to it so far in our discussion), he is profoundly silent about property, the implication being that there was no usage giving an unqualified exemption from punishment for homicide on that score. However this may be, I hold that no other pronouncement than this can be made, even in the external forum, when we come to consider and pass judgment on the common opinion—which, in addition to the doctors in their comments on *Cod. 8, 4, 1*, Farinacci (place named, qu. 125, n. 169, onwards) and Carpzov (*Practica rerum criminalium*, qu. 32, n. 14 and n. 21, onwards) defend at great length: but I qualify my opinion (1) When the thing (at any rate, speaking comparatively to the wealth of the injured party) is of great value or price, so that it can in some sort be taken as ranking with his blood; (2) When no other mode of defense is feasible, or where, if the thing be lost, there is little or no chance of its being regained; (3) Where, in the course of the defense, there emerges a high likelihood—having regard to the kind and the details of the struggle—of danger to life or limb. And Carpzov adds some others which especially concern the killing of a nocturnal thief (place named, qu. 32, n. 38), and which are not out of accord with our Law.

So far, then, as to the considerations which we have premised with regard
 34 to a man's claim to exemption from punishment under the *moderamen inculpatae tutelæ*.

And here, as head No. 3, it is to be noted that, although a man goes beyond the assigned limits in defensive homicide, he does not incur liability as a matter of course to ordinary punishment, but to some arbitrary and special punishment; for it all depends upon which of the premised requisites of *inculpatae tutela* is missing, that is, as the doctors usually put it, upon the Cause or Manner or Time of the defense.

35 As regards Cause—the killing must be in self-defence and must not be for revenge (text in *Dig.* 9, 2, 45, 4, towards end; and c. 18, X. 5, 12). He, therefore, who, despite the fact that he was the aggressor, finds himself in peril, and who, turning his act into a kind of self-defence, kills the other party, exceeds the *moderamen inculpatae tutelæ*; and so does he who, though being the assaulted party, kills his assailant when the latter is retreating and, maybe, fleeing.

As regards Time—this implies the presence of peril. Accordingly, one who is forthwith repelling force by force may lawfully kill his man, as has been said, but not he who does so after an interval (text in *Dig.* 43, 16, 3, 9).

Lastly, as regards Manner—this requires the observance of proportion in defense, and an equality in weapons. The latter is not, indeed, to be taken literally; but it goes at any rate as far as this, that one who is attacked, but not with deadly weapons, must not use deadly weapons in defense (c. 18, X. 5, 12, at end), at any rate if other weapons and means of defense are available, as laid down by Carerius (*Practica causarum criminalium*, aforementioned, qu. 28, n. 27). Undoubtedly, if no other weapons or means of defense are available, deadly weapons may be used, with due circumspection and not with intent to kill the aggressor, according to what we have said above, and to c. 18, X. 5, 12, at end. In short, to the greater or less degree in which the defender has gone beyond proper limits of defense in one or other of the aforementioned details, so will the homicide entail graver or lighter punishment, at the discretion of the magistrate. This is similarly provided in the Sanction of the Emperor Charles, art. 142, line *nemlich ist hierin*.

37 Collect and note, as head No. 4, that the causes which have already come under our scrutiny furnish a ground for *inculpatae tutela* where there is an imminent present danger, as in the cases mentioned of rape or the lopping or mutilation of a limb. And, according to the opinion of many doctors (allow me, however, to claim that the opposite opinion is sounder), the same holds good of personal or real injury, such as by blows or a forcible attack on property. If, however, the dangers no longer impend, but (so to say) have come to a halt, they furnish no further ground for *inculpatae tutela*, but rather point to vengeance for past wrongs: as, for example, where a woman has been violated and then, after an interval of some days or weeks, kills the violator,

the case goes beyond the *moderamen inculpatæ tutelæ*; and so in similar cases. But, because of the provocation, the penalty is usually lighter than the ordinary one; and the laws have provided for this in other cases also (*Dig.* 48, 8, 1, 5; *Cod.* 9, 9, 4).

It must further, as head No. 5, be noted that there are persons to whom 38 the *moderamen inculpatæ tutelæ* does not apply, even when they have been violently attacked or assaulted. The reason is, that there is a public permission given to kill them, and, accordingly, the widespread saying of the doctors holds in their case, namely, that wherever offense is just and lawful, defense is unjust and unlawful. The persons referred to include enemies, rebels, deserters, and public thieves, who may be lawfully killed by any individual as being disturbers of human society. And this I think agreeable to the Law of Nations. In the Roman Law, the class includes nocturnal devastators of land, public robbers, and military deserters (*Cod.* 3, 27: 1 and 2). And adulterers taken in the act must also be included, if we go by the Roman Law —with a distinction, however, between a father and a husband; for any one who is caught by a father in adultery with his daughter in his house may be killed, but not by a husband, unless the wrong-doer's social rank be such that the *Lex Julia* allows his being killed (*Dig.* 9, 9, 4). The reason of this 39 distinction is given in *Dig.* 48, 5, 25, where the list is given of those whom, according to the *Lex Julia*, a husband may kill if he takes them in adultery with his wife. On this topic the principles of our Law are such as not to lead to much discussion; but I fear that the distinction in question does not obtain either under the Law of Nature or of Nations. Nay, it seems, rather, that in that Law neither father nor husband has a right to kill, seeing that the adultery of daughter or wife does not destroy either his life or the possibility of his continuing to live with honor; and this especially applies where the woman is killed with the adulterer, as if by way of private vengeance, a thing allowed by the Roman Law in the case of a father (*Dig.* 48, 5, 24). To the class under consideration belong also those who are under a ban. Individuals may attack these and kill them at pleasure. This holds of persons under the Imperial ban (see *ordinance of the Reichskammergericht*, part 2, tit. 9, § 80 *jemand*).

From what has been said, it is evident not only that homicide of the *inculpata tutela* kind is permitted by every sort of Law, but as a consequence that the killer in self-defense is safe in the forum of conscience.

Whether a man is bound to defend himself even as far as killing his 40 assailant, is a question discussed by the doctors. I think that by the Law of Nature the answer should be in the affirmative; for, if a man be bound by natural instinct and the dictate of Right Reason to preserve his life by repelling whatever is hostile thereto to the utmost of his power, he is certainly bound to slay an aggressor during the act of aggression if he has no other means of safety. There are certain exceptions which you will find set out in

Besold and Brunemann on *Dig.* 1, 1, 3; but I can not admit that these hold good under the Law of Nature, and certainly not in the forum of conscience.

41 And it also clearly follows that suicide is repugnant to the Law of Nature and to the Divine ordinance; and this is so, even if the reason of the suicide be mere weariness of life and not a guilty conscience. For no one ought, of his own motion, to desert the post of life which has been assigned to him by Another than himself; but he ought to await the end which will be provided by the Divine recall.

42 Some, however, take a different view when, for instance, the object is not the suicide but the public safety, as where a man is killed when setting some gunpowder on fire in order to prevent that munition of war from falling into the enemy's hands. But the Law of God and of Nature, forbidding suicide, is paramount, and the opinion in question seems hardly safe in the forum of conscience, when applied to such a case as that under consideration, namely, where a man in public interest dooms himself to destruction by his own hands and acts. The case is, however, different where a man seeks even certain death on behalf of the State, but at the hands of the enemy, as the Spartans did in days of old at Thermopylæ, and as the two Decii devoted themselves, on behalf of the Roman army, to the infernal gods (though it was a pagan superstition) in the battles against the Gauls and the Latins.

Under this head is also put a case which concerns, not public safety or expediency, but private honor, namely, where a maiden or honorable matron flings herself into a river or seeks some other form of death in order to avoid outrage threatened by an enemy. In such a case, self-slaughter is reckoned lawful because of the seeming impossibility of living thereafter an honored life, or, better still, because of the risk of some consent to sin, it being deemed a hard thing in such case of outrage to keep the mind entirely free from all stain: and just as the apprehension of outrage renders the killing of another lawful, because of the stigma and disgrace which would attach to the rest of one's life, so, if it be impossible to kill the assailant, the same permission is given with regard to one's own body; and this is so true that in such circumstances the self-slaughter is held to be justifiable, or at least excusable, as not committed with intent to die but with intent to avoid disgrace. (See Grotius, *De jure belli ac pacis*, bk. 2, ch. 19, § 5; and Pufendorf, *De jure naturæ et gentium*, bk. 2, ch. 4, § 5.) There are others who think differently, because they think death a worse evil than outrage; but if this were in itself a conclusive reason, it would not be held lawful to kill another who was attempting a violent outrage.

But let this suffice as a treatment of the present topic.

CHAPTER VI.

Of Religion and Natural Theology.

SUMMARY.

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| <p>1, 2. Religion is a thing agreeable to the Law of Nations.
3. Wherein it consists.
4. Its two parts: Knowledge of God and Worship of God.
5. The four pronouncements of Religious Knowledge according to Grotius.
6. Ziegler's objections thereto.
7, 8. Grotius' replies.
9. Natural knowledge of God's essence and attributes.
10-12. The existence of God demonstrated.
13. Knowledge of God is twofold, Absolute and Relative.
14. God is, in essence, pure activity and intelligence and life and love.
15. That God is One demonstrated.
16. God's various attributes.</p> | <p>17. The Relative Knowledge of God: wherein it consists.
18. The truth of Creation and Preservation demonstrated.
19. God's Providence proved.
20. Atheism repugnant to Right Reason.
21. Atheists should be barred from public councils.
22. Atheists overthrown by demonstrable Reason.
23. Polytheism and Idolatry repugnant to Reason and the Law of Nature.
24. Immortality of the soul.
25, 26. The worship of God is not arbitrary by the Law of Nature.
27. Christianity more consistent with the light of Right Reason than all other religions.
28. Professed atheists a danger to the State and worse than Epicurus.</p> |
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One outstanding branch of the Law of Nations, or as some would style it, ¹ Natural Law, is Religion. The jurisconsult Pomponius refers to this in *Dig. I, 1, 2*; and Cicero admits its necessity in his *De natura deorum*, 1, where he says, "With the destruction of piety, holiness and religion go too; and when these go, there ensues a disturbance of life and an utter confusion." Elsewhere he writes (*De inventione*, 2), "There is no people so barbarous, so wild, as that its mind is not penetrated by some opinion concerning the gods." In almost the same sense Aristotle wrote (*De cœlo* 1, ch. 3), "All men form some sort of conception about the gods." And Seneca (*Epistle* 117) wrote, "There is nowhere any people so utterly outside law and morals as not to believe in some gods." From this it may be gathered by common consent of ² peoples, or at any rate of the more cultured peoples, that Religion is approved not only to the glory of God but also as a necessary basis for the preservation of civil society in the human race. For if you were to remove the fear of God from human intercourse, you would at the same time remove, beyond doubt, the reverence of citizens and subjects for Kings and magistrates, and the reciprocal bond of law-abiding faith between not only private persons but also Kings and States. Hence, in the council of war of Scipio Africanus the perfidy of the Carthaginian ambassadors was reprobated, as Livy tells us

in his *History* (bk. 30); and the latter were admonished, by way of confirmation of the newly made peace, to be at length taught by their numerous defeats to believe in the gods, and the sanctity of an oath, as if to show that there was in matters of peace and treaties no firmer bond of human good-faith than Religion. This is a point which Plato makes in his *Epinomis*.

3 Religion can be defined in the light of Reason as being a constant reverence and recognition of the Deity alike in the thoughts and actions of the human soul. Slightly different from this is the opinion of Marsilius Ficinus in his *Eutyphe*, where he subtilely distinguishes Piety, Holiness, and Religion as follows: Piety is the recognition of God; Holiness, the rendering to a confessed God the things that are due to Him; but Religion, the indissoluble binding of a man to Him in meditation and in good works. But in effect this seems to come to the same thing as what was said before; for that indissoluble binding is nought else than a tie with God of constant reverence in all activities, whether internal or external.

4 Religion, then, may be split up into two especial parts, namely Knowledge and Worship of God. Knowledge is twofold, Natural and Revealed; that is to say, it is of twofold origin: for the Light of Reason, whence comes the Natural Knowledge of God and Divine things, is one thing; and the Light of Revelation, with which theologians are concerned, is another. From the latter the heads of Revealed Religion, so far as included in Holy Scripture, come. We speak now of the former.

5 Grotius (*De jure belli ac pacis*, bk. 2, ch. 20, § 45) includes the Natural Knowledge of God under four pronouncements by which true Religion, common to all ages, is indicated. These are (1) God is, and is one; (2) God is nothing of things visible, but something above all these; (3) God has a care for human affairs, and submits them to absolutely just judgment; (4) This same God is the maker of all things external to Himself. And Grotius, in the passage cited, shows that all these pronouncements are conformable to the first table of the Decalogue.

6 But Ziegler falls foul of him in his comment on § 45 above cited. Ziegler's more forceful objections are the two following: (1) That what Grotius includes in the categories named is not a true Religion which is common to all ages, but only a Natural Knowledge of Divine things; (2) That this Natural Knowledge is imperfect alike as regards practice and theory—that is to say, in so far as it never teaches Who God is, but only frames something about God by way of general notion. For, says Ziegler, Reason left to itself and apart from antecedent Revelation can never conceive such Unity of the Divine Essence as is not multiplied in a Plurality of Persons or such a God as is the Father of our Lord Jesus Christ; hence, the Unity of the Essence which forms part of the Christian belief is not that Unity of Supreme Be-ing which is investigable by the natural efforts of fallen man, according to Hülsemann (*Breviarum*, suppl. c. 2, n. 2).

With all respect to this writer, I must say that this barely touches 7 Grotius' opinion. Rightly considered, the latter is not open to the censure in question; for Grotius has here no intention of declaring that true and perfect Religion which is sufficient for eternal life, but only that which is "common to all ages," and which is yet true in that it is ever recognized as true in common estimation, a sense in which it is impossible to say of all the dogmas of Revealed Religion that they are "common to all ages." For, whether they were known of the Children of Israel in the Old Covenant (a point which is, however, not entirely uncontroverted to-day), and were on that account received also among other peoples, or at any rate among the more cultured peoples, as matters of religious perception—this is an open question.

Next, Natural Knowledge of Divine things, derived from the light of 8 Right Reason, is not to be opposed to Revealed Theology. And, although it be set aside on the ground of insufficiency, it does not follow that it is not true; nor can a valid argument of its falsity be deduced from its imperfect character. To take a particular case, an error about the Holy Trinity in things Divine does not destroy the truth of knowledge about the Unity of the Essence. Now, one who knows the Divine Essence as existent of Itself, and supremely spiritual and active and all-knowing, all-powerful, unchangeable, eternal, and One in Itself, may not know that there are Three Persons in this Supreme Essence; and yet he knows God Who in Essence is One, for these attributes of Divinity do not belong to any but the true God. Nay, it can be asserted without contradiction that such an one knows God Who is Threecold in Persons, though he does not know Him as Threecold. When, then, a man knows the postulated matters of Substance which, according to the truths of our Religion, hold only of the Threecold God, how can we deny that he knows God Who is Threecold, albeit not knowing Him in every respect in which He is knowable, not (namely) as regards the Trinity.

With regard to the main question, although I doubt not that the Natural Knowledge of God extends to more things still, yet the four propositions of Grotius seem to be the predominant heads of Natural Theology, at any rate as regards the current practice of human life and the assent of mankind in matters of Religion. Yet other propositions still—and these most worthy of being known—may, beyond question, be shown by the light of Reason: as, for instance, that God exists of Himself in supremely active mode, and so is pure Activity, utterly spiritual, and understanding in most perfect manner 9 His own Essence and, in virtue of this knowledge, the natures of all things in preëminent fashion as being, through an imparting of goodness, as if by some outside agency, capable of being reproduced and brought into (so to say) the state of existence. Herefrom the Divine Omniscience and Omnipotence can, not obscurely, be gathered, since He Who can do all things that can be done is of necessity omnipotent. Now, God can do all those things, either when acting alone or when secondary causes play the part of prime

causes; no third method can be assigned. Again, seeing that the Divine Essence embraces the images of all things and God has consummate knowledge of His own Essence, He can not but be All-knowing. Further, from that utter spirituality of the Divine Essence, and from Its Existence of Itself, are deduced Its immutable and eternal character in all Its manifestations, since It can not suffer any change or corruption either from any external cause of change, by reason of Its effectual independence, or from any dissolution of Its parts, as if It were lacking in these. That is, accordingly, a fine strain of Philosophy in Severinus Boethius' *De consolatione* (bk. 3) :

" O Thou Who governest the world with perpetual wisdom, Sower of earth and sky; Who orderest time to issue from eternity, and givest motion to everything, Thyself remaining unmoved; Whom no outside causes have driven to devise the labors of fluctuating matter, but the indwelling and immaculate form of the Supreme Good: Thou evolvest all from a supernal pattern, shaping in Thy mind a beauteous world, Thyself most beauteous, and framing like in the image of like."

10 Yet, some one may perchance say, it is futile to enter on a discussion of the Divine attributes when the light of Reason does not demonstrate the existence of a God. Away with such a thought! and allow me to exclaim with Justus Lipsius (*Ad Belgas epistola*, cent. 2, 26), " Come, brain and pen and hands, arise and kindle in the proclamation of Him Who has made and guided you and set you in motion." For if, as experience teaches us, some existing things derive their existence from others, as shrubs and herbs and animals do from the sun and its diffused energy, and that which is the source of any of these things is, in its turn, also derived from something else, and this from another, and so on without end, this series of causes and effects either is a movement in a circle or else it reaches some prime starting-point. Movement in a circle it can not be, both because it is in itself absurd that grass, for instance, which is the product of the sun and its heat, should have been the source whence comes the existence either of the sun's mass or of the predetermining cause of the sun, and also because, on the assumption of such a movement, the whole series of things would be destroyed by the destruction of any one of the things which are assumed alike to give and to receive existence each from the other. Experience testifies to the contrary of this.

Nor is there an unending march onwards from cause to cause, as is not only shown with regard to every kind of cause by Aristotle (*Metaphysics*, bk. 1 (in some editions, 2), ch. 2), but is also supported by the consideration that otherwise there would actually be an infinite multitude of things. Now, according to Aristotle (*Physics*, bk. 3, ch. 5), it involves a contradiction to suppose that there actually is an infinite number of things. This also admits of the following succinct proof: Whatever number be taken, it can be added to; there is, then no infinite number. I accept this as a basis of argument. Now every number, whatever its size, contains more fives than tens, more tens than twenties, and so on, as is obvious from the proportion in which these

numbers stand to each other. More tens and more twenties can then be added, and in consequence the number can not be infinite. Accordingly, the only and the inevitable conclusion is, that in our series of causes and effects 11 we must reach a prime original which serves as cause of the existence of all the others, without anything serving as its cause; this we call God. And if you impiously persist in denying Him, what you deny is the Name; that is, you deny that the ultimate something wherein the series of causes comes to rest ought to be called God; you do not deny the Deity, in point of substance.

The same may also be demonstrated as follows: On the assumption that there is no God, there is no such supremely necessary Being as we call God. But this is false, and therefore the major premise is false, too; and a God, therefore, is. The minor premise is deduced in the following way: If there is no supremely necessary Being, all things may be non-existent. But this is impossible; for in this way it would be possible for nothing to be, since, if nothing actually were, it would not be possible for anything to be, seeing that it is inconceivable how anything should pass from not-being to being unless there were a pre-existent something to act as the cause of its existence.

Many arguments in proof of the existence of a God may be gathered 12 from Aristotle (*Physics*, bk. 8, ch. 5, and following; also from his *Metaphysics*, bk. 11 (which some call 12), ch. 6 and especially ch. 7), Thomas Aquinas (part 1, qu. 2, art. 3), Father Philip of the Blessed Trinity (*Summa philosophiae*, part 3, qu. 22, art. 1), and other extremely numerous theologians and philosophers. To these add the already mentioned *Epistle of Lipsius*, which is very well-written and thoroughly deserves reading; Paul Voet (*Theologia naturalis reformati*, ch. 3, § 2, n. 4); and more recently, Franciscus Cuper (*Arcana atheismi revelata*, bk. 2, ch. 11, the whole). As regards this last-named, I wonder, however, that he (preface, towards end) should hold God to be a Being with extension, circumscribed in place and in time, and this so insistently that the contrary opinion seems to him sheer atheism. I shall shortly show that this position is self-contradictory. Further, concerning the Divine attributes, as known by the light of Reason, I may refer to Boethius, in the little book already mentioned; Aristotle, passage already cited; and the commentators on this passage, namely, Thomas Aquinas and the scholastic theologians, especially the pre-eminent theologian Philip of the Blessed Trinity (aforementioned *Summa philosophiae*, part 3, qu. 23, art. 2 and following, where he accurately discourses on these same topics).

Further, this Natural Theology, issuing from the light of Reason, 13 which is concerned with God, the infinitely Good and Great, may be divided into Absolute, that is, as regards the Divine Essence and Its attributes in Itself; and Relative, in respect of His creatures. In the former we particularly learn about God by a negative process; namely, by removing all those things which imply imperfection or a derivation from any prior cause or dependence, as being inconsistent with the primary conception of God.

Hence, as the very light of Reason shows, God can be none of those things which consist in bodily mass and involve matter and passive power in an essential fashion. This renders it impossible that God should have extension, particularly in place and time; for the things which have this quality are divisible into part and are changeable, which is repugnant to the essential principle of Deity. Aristotle, in the passage *quo circa* in his *De cælo*, ch. 9, says finely: "And what are in that place (namely, beyond the first heaven) are not such as possess locality, nor does time make them grow old, nor is there any change in any of those things which are ranged beyond the furthest reach; but, subject neither to any strife nor to any passion, they lead a perfect and utterly sufficing life in a universal eternity." And Boethius (*De consolatione philosophiae*, 5) bears witness that "eternity" is "an interminable, and at the same time a complete and perfect, possession of life." This is also susceptible of sound demonstration by reason. For, if God lives only from moment to moment, as we do in this our mortal life, it follows that at some time he can non-exist. I accept the consequence. For if at any point of time it is true that something does not exist, it is at the same moment true that it can non-exist, it being impossible for anything at one and the same moment not to exist and not to be able to non-exist. Wherefore, if the existence of God now, and up to to-morrow or any future time, be different from what it will be to-morrow or at such future time when that time arrives, it follows that it is true to-day that in the future it can non-exist; now this is utterly false by virtue of what has already been shown, and implies a contradiction in terms.

14 God, then, God the infinitely Good and Great, is as an inevitable consequence, pure Actuality, existing in His Essence unchangeably; and, further, Life in indubitably its perfect form and Intelligence must also be attributed to the Author of life, lest otherwise it be thought that this all takes place without knowledge and in, as it were, a sleeping kind of way (a point which Aristotle also reprehends as unbefitting). Thus, then, God must be Mind existing through Its own Essence and supremely perfect; such indeed He is, if He perfectly know Himself, than whom naught can be or be conceived more perfect. This is brought out by Aristotle (*Metaphysics*, bk. 11, above-named, ch. 9) in the words, "He therefore understands Himself (that is, the Divine Mind, of Which he is there speaking) if, indeed, He be the highest excellence and He is Intelligence of intelligence"; and at the end of that ch. 9, he says, "Wherefore, for all eternity He is the very Knowledge of Himself." Hence it follows that it is the grossest error to claim Nature, or the series and connexity of the universe, as the prime cause of things, as do the atheists. For a series or order presupposes one who arranges in order; and such things as are in connection, whether one or many, are corporeal and are clearly alien to the principle of the prime cause or origination of things. Surely, atheists should rather venerate the Author of this universe by reason of His work than, with blended impiety and falsehood, lay the supreme glory of the origin of things upon things that have been fashioned. (See *Book of Wisdom*, 13, 3, onwards.)

Further, it is also admitted that there is in God a supreme Love of Himself by reason of His perfect Knowledge of His own most perfect Essence. Aye, and from this supreme and utterly perfect Actuality it can not but follow that the Supreme Deity is One, because Existence belongs to God from within and by prime conception; for it can not be either that He is non-existent or not existent of Himself, if He be God. Of a truth, Existence implies a singularity or the being *this*, and He can not be God unless He be this absolutely identic Deity to Whom that Existence as Divine pertains in individuality. It is therefore impossible that there be several supreme deities, just as it would be impossible that there should be several men if the existence of Socrates were implied in the prime concept of the human race.

So much about the contemplation of God *absolutely*; and to this may be added His attributes, such as: infinite perfection, omniscience, omnipotence, unchangeableness, immensity, eternity, and life of an essentially perfect kind. Of these I have in part spoken; and in part philosophers and writers, in the passages quoted, professedly deal with the topic and demonstrate God's substantial predicates or attributes.

The Relative Knowledge of the Supreme Deity contains the three following matters: The Creation of things, their Preservation, and Providence. Created things neither can nor could draw themselves (so to say), before they came into existence, from the abyss of nothing into the condition of existence; but, in order that they might come into existence, they needed a Divine operation whereby there was actively communicated to them, as by a kind of beam, the essential principle of existence.

And during their existence, and while they remain in being, they are no less dependent on that Divine operation which philosophers commonly style Influx (*influxum*) into being. For they are not of themselves beings during the progress of their life or existence, since this is clearly inconsistent with the nature of things. Therefore, for the continuous existence of creatures a continuous Divine Influx is necessary; and upon its withdrawal they who were nothing before would become nothing again. It is in precisely the same way as this that the diffusion of the rays of some luminous body like the sun is needed for the illumination of the air; and for the persistence of this illumination there must be a persistent diffusion of the solar rays; and upon their cessation, as when the sun sets, the air immediately ceases to be luminous. This is what Christ says in St. Matthew's Gospel, ch. 4, "Man does not live by bread alone, but by every word that proceedeth out of the mouth of God"; and so also the Apostle (*Acts*, ch. 17), "In Him we live and move and have our being."

Further, the Divine Providence is also clear, according to the principles of sound Reason. For God is not ignorant of His own eternal workings and knows things before they come to pass. It is, indeed, agreed by all that He does not act at random, but in accord with a plan of His own shaping, in virtue of which those things also which in themselves are contingent are directed by

Him in their due time to their fitting ends. This is thereafter perceived by us mortals not seldom, especially in wars and the preservation of kingdoms, and in other more notable crises of human affairs.

20 Since this is so, it is clear that atheism is repugnant to the light of Right Reason and, therefore, to the Law of Nature itself. And so such men as are found to be tainted therewith (and it is sad that some such are found among Christian peoples) ought to be hounded out of the State as enemies of human nature; and, above all, they ought to be kept out of public councils if any happy issue is to be hoped for therefrom. For, as Theognis says, " Many are of ill advice but the Deity is propitious to them, and so what seemed bad turns to their good; while there are others who make wise plans, but the Deity is unpropitious and their plans miscarry." Now, does any one believe that the Deity will be favorable to those plans, however much they may on the surface seem to be sagaciously conceived, which are devised by persons who, by their denial of the Deity, are His enemies? Hence, Diogenes the Cynic, according to the story told in Laërtius' *Life* of him, made the following answer when he was asked by Lysias whether he believed in the gods: " How can I but be a believer in them when I perceive that you are their enemy? " (namely, by putting such a question in a doubtful way).

21 Indeed, there is all the more reason for refusing atheists an entry into weighty councils if we hearken to Holy Writ, where they are called fools, as in the fourteenth Psalm, " The fool hath said in his heart, There is no God." Who could suggest that fools should have a voice in matters of great moment? If, despite the authority of the Psalmist, which should suffice, you seek further proof hereof, it can easily be furnished out of the Scriptures, which tell us that the fear of the Lord is the beginning of wisdom, or wisdom's very self (*Proverbs*, ch. 1, v. 7; *Ecclesiasticus*, ch. 1, v. 16; *Job*, ch. 28, v. 28). Now, atheists have no fear of God, for they do not believe in Him; they therefore lack the foundation of wisdom and are, in consequence, ignorant and foolish.

22 Come, now, let us argue *κατ' αὐθεπτον* (*ad hominem*) against the atheist. Suppose there were two men, both of whom wanted to show you the road at a meeting of two ways. One of them insists that this and no other is the right road if you want to reach your goal. The other admits that if you take the first as leader you will reach your desired end, but claims that by following him himself you will also get there. Which will you follow? Doubtless, if you have any sense, the first; because both admit that you are surer of getting where you want to be if he leads the way. Now, you recognize in these two guides Christ and Epicurus. Christ teaches that such and such measures are necessary to attain the goal of human happiness, and (as will be shown later) Epicurus does not deny this; but Christ does deny that the teaching of Epicurus makes for happiness. What wise man will not, then, dismiss Epicurus and follow Christ, whose Gospel does not reject any of those good things of this life which Epicurus commends, but enjoins the use of

them in moderation and promises, moreover, things far more excellent for the life that is to be?

A second matter (2) which clearly emerges is that a plurality of Gods 23 and idolatry are contrary to the light of Reason and to the Law of Nature. Consult on this point Aristotle, *Metaphysics*, bk. 11, ch. 8, towards the end, where he asserts that idols were invented in order to influence the common folk, and to support the laws, and in the interest of human life, and that the doctrine that such images were gods and that all nature was immanent in the Deity was passed on from hand to hand among primitive peoples like a folklore story. Here, however, the Philosopher lays himself open to criticism, for he admits in the context the existence of several Prime Substances under the name of Gods. Now the words Prime Substances and Gods, in their wider sense, obviously stand for heavenly intelligences (whom we speak of as "those above"), because Aristotle elsewhere admits not only that the Prime Mover is One, but also (*Metaphysics*, bk. 11, ch. 10, at end) that the Supreme Deity is One, as the Absolutely First Principle. His words are clear: "But the nature of things does not admit of faulty administration. The government of many is not a good thing. Let there be a single ruler."

Many other propositions, susceptible of natural knowledge by the light 24 of Reason, and kindred in their own way with Natural Theology, might be brought forward and dealt with at length. Such is the proposition that the human soul is immaterial, is endowed with faculties such as intellect and reason which are absolutely inorganic, and therefore is immortal. (Aristotle, ch. 9, just mentioned, and *On the Soul*, bk. 1, ch. 4, and also bk. 3, chs. 4, 5.) Nay, more, that it is the image of God was long ago clearly seen by (among others) the old poet Phocylides where he says:

Ψυχαὶ γάρ μίμονται ἀκήριοι ἐν φθιμένοισι.

Πνεύμα γάρ ἔστι θεοῦ χρῆσις θνητοῖσι καὶ εἰκών.

(For spirits abide scatheless among the dead, the soul being the operation of God in mortals, and His image.)

For several other propositions, Slevogt, formerly a well-known professor at Jena, in his disputation *De lumine naturæ*, finds support in the old philosophers. But, inasmuch as the scheme of our treatise does not admit of our wandering off at this point into a philosophic discourse of each of these matters, we will rest satisfied with the few remarks and deductions concerning Natural Theology which we have so far made.

It now remains for us to treat briefly of the Worship of the Deity. And 25 at the outset let us explode the doctrine, attributed by some to Themistius, that all that God requires, in accordance with the dictates of Right Reason, is the worship of Himself, He leaving the manner thereof to human discretion. In truth, the manner of Divine Worship must also be a seemly one; for otherwise it might properly take the shape of the sacrifice of human victims, as has been the practice of various barbarous peoples at different times, and even when the Children of Israel sent their children through fire to the idol

Moloch, that is, Vulcan, or when the Tartar peoples of Circassia sent theirs through dung and milk—the rite would be acceptable! But this is absurd.

26 Far sounder is the teaching of Cato and others, that God must be worshipped with purity of soul. This purity consists alike in the true knowledge of God, in a faithful and constant contemplation of things Divine, and in a sincere and upright attitude towards God and the practice of the virtues. That is a fine saying of Aristotle (*Nicomachean Ethics*, bk. 10, ch. 8) :

“ Now he whose life-activities are directed by Reason, and who cultivates Reason and is in the most rational state of mind, is also, as it seems, the most beloved of the gods. For if the gods (here Aristotle speaks as pagans do) reck at all of human affairs, as is well agreed they do, the likelihood is great that they delight in what is best and most related to themselves, that is, in Reason, and that they requite with kindness those who love and honor it above all else, as caring for what is dear to themselves and performing right and noble actions.”

27 So Aristotle. From this we may conclude (1) That Christianity, albeit containing much that is past finding out by unassisted Reason, yet, when its final aim is kept in mind, is the religion which is most agreeable to the light of Right Reason; for it does not lead man to the lusts of the flesh, but teaches the worship of God in purity of soul and, indeed, in a loftier purity which emanates from the Holy Spirit. And on this ground Wilhelmus Grotius¹ rightly prefers it to all other religions, in the book, *De veritate religionis Christianæ*.

28 We may deduce further (2) That they who surrender this life to the pleasures of the body, as professed atheists elect and are wont to do (so says the *Book of Wisdom*, ch. 2), are most harmful persons to have in any well ordered State, especially a Christian one. For they seduce others from Divine worship and from furthering the ends alike of Religion and of the State. Indeed, to speak truly, men of that brand are far worse than Epicurus himself: for he started from the false principle that after this life there awaits us neither any happiness nor any pain (a principle which Cicero, though in other respects at variance with Epicurus, adopted in his book *De finibus*), and it was that principle which led him to advocate pleasure as man's greatest good in this life; but (if we are to believe Diogenes Laërtius, in his *Life of Epicurus* and the *Letters of Menæceus*) this pleasure was not that of the gullet or of the generative organs, but was consistent with a practice of the virtues, and these he expressly declared to be inseparable from a happy life. The gentry we have in mind are, then, Epicureans who are not of the lineage of Epicurus; and we can only wish for them a sounder head and for their State better citizens!

So far on the topic of this chapter.

¹ The work referred to is by Hugo Grotius, who makes no mention of Wilhelmus Grotius in bk. II, section 10, where this statement is to be found.

CHAPTER VII.

On Dutifulness to Parents and Fatherland.

SUMMARY.

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| 1. Children bound by Natural Reason to show dutifulness to parents.
2. "Children" here includes natural children, not merely the lawful-born.
3. 4. Natural Reason enjoins obedience to father in priority to mother or grandfather, provided he is of sound mind.
5. 6. Filial duty of obedience does not extend to things base and illegal.
7. How far paternal power is based on Law of Nature.
8. Duty to fatherland belongs to the Secondary Law of Nations.
9. The sanctity of this duty and examples.
10. Fatherland is either common or special. | 11. We owe a duty to the common fatherland, and in what sense.
12. The degrees of duty towards fatherland.
13. Rebels against fatherland break the Law of Nations.
14. Whether we owe a duty to an ungrateful fatherland.
15, 16. Whether this obligation continues when domicil is fixed abroad.
17. Whether it overrides filial duty when the father is acting traitorously to fatherland.
18. Whether patricide is lawful for treason.
19. <i>Dig. 11, 7, 35</i> considered.
20. Except for necessity, a son not bound to kill his outlawed father. |
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In consideration of the duty of maintenance and education, and also on the ground of birth, it is right that children should be bound to obedience and respectful conduct to their parents. And as, of course, this is in the Decalogue also, it is a matter of both Divine and Natural Law. The Emperor Gordian (*Cod. 2, 2, 2*) declared that honor was by Natural Law due to patrons and their parents, children and heirs. This can only mean due by the Secondary Law of Nations, which has been shown above to depend on Natural Reason; for Natural Law in the strict sense knows nothing of the patron's right to respect from his freedom, slavery being unknown to that Law (*Inst. 1, 2, 2*; and *Dig. 1, 1, 4*).

Now as we have based the filial duty of respect and obedience on birth, the words "parents" and "children" must here apply to natural parents and children, and not to the case where mutual rights have arisen under the civil fiction of Adoption or from the agreement which usage sanctions concerning the joinder of offspring; but they do apply here to the case of illegitimacy, such as arises from casual or adulterous or incestuous intercourse, and the Law of Nature enjoins the duties in question on children so born. This is a matter of parity of reasoning. For their parents are bound to maintain them, as said above; and we make no distinction here of sex, age, or degree, all descendants, of whatever degree—male or female, majors or minors—owing respect to their ascendants (who in the same way can claim no exemption, on their side, in respect of any of these details).

3 But as regards the claim to obedience a distinction arises. First, on the ground of sex: for if the father and mother give contrary orders, each of a proper kind, the father must be obeyed before the mother, both because his is generally a better weighed judgment and because the burden of maintenance and education is primarily on him; and so he must be obeyed before any one else.

Then again, on the ground of degree of consanguinity: for by the same reasoning, if father and grandfather have given contrary orders, each of a proper kind, the father must be preferred to the grandfather—that is, by the Law of Nature; for this is not exactly the attitude of the civil authority, which at times prefers the grandfather. The reason of this general rule is, that the offspring is by descent more intimately connected with the father, and also that, as above said, the care of the child's upbringing devolves on him before the grandfather.

4 Further, on the ground of age: for while a son must undoubtedly obey a father who is quite sane, yet if, as happens to some in extreme old age, the father's mind becomes so weak that he is almost in a second childhood, how could we hold the son bound to follow the father's directions when the father is himself in need of direction and assistance? The same thing holds of an insane or mentally afflicted father, and especially of one who is a spendthrift. There is reason in this: for filial obedience is in the interest of the child, in order that it, obeying the wise admonitions of its father, may be better brought up; but this is inoperative in the case of a father who is insane or mentally afflicted, or otherwise incapable of good governance, and especially in the case of a spendthrift father.

5 Again, another limitation on obedience has to do with the nature of the command; for the duty applies only to such as are not morally bad, nor inconsistent with the Law of God, nor opposed to human laws or to the public enactments of Princes and others in authority. If, then, the parent's command is of any of these kinds, children are not bound to obey. This is obvious as regards breaches of morality or of the Divine Law. And that statute law and magisterial ordinances also have priority over paternal injunctions is clear enough, from the fact that the former are public and the latter private, and that the father is himself subject to the sanctions and decrees of the legislative and executive authorities.

6 One may not do by means of another, namely, a son, what one may not do oneself. In such a case, then, the son is right in refusing obedience to his father; and all the more so, for that the son in all cases is under the same obligation as if he were independent of parental control, as is said in *Dig.* 44, 7, 39. Filial obedience can not be pleaded as an excuse for disobeying the law, although sometimes, if a son breaks the law in obedience to his father, the punishment may be lessened on the ground of the awe inspired by the father, especially when the son is of tender age. This shows that paternal power is based in the Law of Nature, not indeed as regards its civil law

results, but as regards the controlling influence of the father, and as regards the two results on the side of the children, namely, respect for their father and obedience to him. (See Schnobel, disputation 1 on *Pandects*, n. 28; Bachov on *Inst.* 1, 8, 2; Arumæus, *Exercitationes* 2, th. 2.)

Let us now deal briefly with the bond of duty towards one's fatherland. 8 Pomponius ascribes it to the Law of Nations (*Dig.* 1, 1, 2); but it really belongs to the Secondary Law of Nations and not, like obedience to parents, to the Primary Law. For the idea of fatherland presupposes, of course, a civil society in the place of one's birth, to which civil society, rather than to the locality as such, a duty is owing. Now this civil society and the constitution of a fatherland belong to the Secondary Law of Nations; and, therefore, duteous behavior to one's fatherland belongs there, too. All the same, this obligation towards one's fatherland is almost more sacred—or, by consent of the more cultured peoples, certainly not less sacred—than the obligation towards one's parents. For fatherly care of 9 children would be all in vain if there were not, in the place of birth, a public defense against violence; and since much good and gain must enure therefrom to individual citizens, it is only fair that this should be repaid by a duteous affection towards the fatherland on the part of these individuals. Hence, as Cato tells, good citizens fight for their fatherland and, if needs be, will not shrink from dying for it, as, in days gone by, the Spartan Six Hundred under Leonidas died, in fight against the Persians. On this ground, among the Romans, the Horatii, and Curtii, and Decii, and numbers of other illustrious men, went to a glorious death on behalf of their country; nor are there wanting in this Germany of ours instances of brave men who, alike in times past and in our own day, have nobly fought for their religion and for their country's freedom—notably against barbarians, Saracens, Turks, Tartars, and others—declining no danger, however terrible, not even the threat of death.

Now, by the Roman Law Fatherland is twofold, Common and Special. 10 Rome is called *communis nostra patria*, our Common Fatherland, in *Dig.* 50, 1, 33. Our place of origin or birth is our Special Fatherland; it is called *patria*, Fatherland, in *Cod.* 6, 23, 9; elsewhere it is called *Origo* (*Dig.* 50, 1, 22). And the same distinction is also drawn, and properly so, by the Law of Nations; and at the present day, in Imperial Abschiede, Germany is in this sense often called our beloved or Common Fatherland, as in the Abschied of Ratisbon of the year 1567 (*§ Und dann hieneben*), Imperial Abschied of the year 1576 (*§ Dieweil aber unsere Königreich*), Imperial Abschied of the year 1594 (*§ Wan aber diese*), and in many other places.

This being so, the duty which we owe to our Fatherland must not be 11 understood of our Special Fatherland only, but especially also, of our Common Fatherland and of the nation and sovereign under whose sway and empire any one is born; for the Special Fatherland may be some obscure place, perhaps some countryside or hamlet where dwell a handful of inhabi-

tants or farm-hands and no one resides with any jurisdiction. How can then any duty be owed to this Fatherland other than what is owed to the Prince or Lord or State that exercises local jurisdiction there? (*Dig.* 50, 1, 30.)

12 It follows, then, (1) That in the duty which is owed to one's fatherland by the Law of Nations, there is involved a subordination according to the degree of lordship and jurisdiction, in such a way that the highest duty is owed to the Supreme Prince, as the father of our common country, and also to the State which exercises supreme power; while a less degree of duty is owed to a Fatherland of lower standing. And this may be seen not only in absolute governments, or in simple forms of government, but also in mixed forms where supreme power is limited by Law.

13 It follows (2) That they who fight against their fatherland, like Alcibiades among the Athenians and Coriolanus among the Romans, act contrary to the Law of Nations, and so they may lawfully be killed as enemies; and Germans who take service against Germans are rightly subjected to the condemnation and punishment of rebels (constitution of the Emperor Henry VIII, *Qui sint rebelles, at Tenore*). And if they have not heeded the summons to return home issued by the Emperor and the territorial Princes, they are all the more justly liable to the punishments decreed by Imperial constitutions. (See Imperial Abschied of the year 1541, § *Und wiewohl wir* and following section; Imperial Abschied of the year 1559, § *Damit dann hinfuro*; Imperial Abschied of the year 1641, § *Setzen, ordnen und wollen*.)

14 And, supposing the fatherland be ungrateful, is the duty still owed to it? To pay it is, of course, a better and nobler thing, at any rate so far as the avoidance of an ill return of ingratitude is concerned; for even if one's country does not quite do what it ought, it should not on that account be pursued with enmity and hatred. When the Roman Republic did not treat Scipio Africanus according to his high deserts and he was at last going into voluntary exile at Linternum, Scipio did not avenge the wrong by deeds, but only by words, saying, "Ungrateful Country, thou shalt not have my bones." The remembrance of his burial in foreign soil was to be a monument to later generations of the ingratitude of his country. If, then, there be citizens—there should not be; and if there be, there is something rotten in the State—who are not advanced in their country in the way which their learning and virtues deserve, that does not justify them in hostile feelings and conduct; but the proper course for them is to take their abilities and character in search of another country, and find one where all will be well.

15 I ask, further, whether the dutious obligation towards one's fatherland continues even when we have fixed our abode and the seat of our fortunes in some other place. And I answer that our zeal for our country's good and our affection for it must be lifelong, on whatever soil our household altar be erected, but this duty seems to import the tacit condition that one has lived in one's fatherland or at any rate has not now obtained a permanent domicil

with a foreign nation (by inference from *Dig.* 49, 15:5 (2 and 3)). If, 16 however, the establishment and transference of domicil has been within the jurisdiction of one's own nation or common fatherland, there only having been a change of special country, that establishment and change of hearth and home does not wholly do away with our duty to our fatherland, but only to a certain extent; we remain, that is, bound, at any rate as regards our services. So the Roman Law provides (*Dig.* 50, 1:15 (3) and 17 (4) and 29).

Although a different ruling may be seen to suit the Law of Nations and our own usage, it may yet be asked whether our duty to our fatherland binds a man even against his own father or kinsman, so that if he be plotting against it, he must be impeached. The affirmative answer follows from what Cicero says so appositely in his *Offices*; namely, If a father shall propose to set up a tyranny or to betray the fatherland, shall a son keep silence? Nay, 17 but he will conjure his father to desist; and, if that avail not, he will accuse him and threaten him with even the extremest measures, preferring, where the ruin of his fatherland is in sight, its safety to his father's. Hence, in *Dig.* 11, 7, 35 it is laid down that a father who is an enemy of our State must not be mourned, and that a son who kills his father on that score, or vice versa, is even to be rewarded. And what Cornelius Nepos, in his *Life of Pausanias* tells us about Pausanias' mother, is consistent herewith; namely, that she was one of the first to shut the gates in her son's face by way of punishment for his conspiracy with the Persians.

Yet it is hard, so close is the tie between son and father and so great the 18 respect owed by the son, to assert that the crime of treason unconditionally allows the son to kill the father, both by the Law of Nature and by that of Nations. For Justinian rightly says (*Nov.* 12, 2), "Contemner of the laws and impious as he may be, he is still the father." And from this point of view, a son who wishes to deter his father from attempted treason should proceed by degrees from persuasion to threats, and then, if the country's danger demand it, to denunciation or accusation, this being allowed to a son in cases of treason as an exception to the ordinary rule about accusations (by inference from *Nov.* 115, 3); and he ought not to stain himself with his father's blood, from spilling which an honorable soul recoils. Nor does the passage just cited from the *Digest*, if properly construed, lay down anything to the contrary; for it is concerned with one who comes with intent to destroy his fatherland and to kill his parents and children, and such an one may of course be killed without exceeding the *moderamen inculpatae tutelæ*.

The father's crime must, then, be one of this kind, and there must be no 19 other way of defending the fatherland, or else, traitor or outlaw as the father may be, the son may not kill him, not even if there be a local statute expressly allowing the killing of outlaws with impunity. (Julius Clarus, *Sententiae*, bk. 5, § *homicidium*, n. 59; Cæpolla, *Consilia criminalia* 5, n. 26; Menochio, *De arbitrariis judicium questionibus*, bk. 1, qu. 90, 43, onwards.)

20 Much less, then, shall a son of a traitor or outlaw be declared bound to kill his father, if there be no notorious hostility on his father's part and the fatherland be in no unavoidable peril. In Livy (*History*, bk. 23), the son Perolla says finely to his father Calavius: “I will indeed pay to my father the debt of duty which I owe to my country; but I am grieved for you, on whom the guilt of having thrice betrayed your country rests: once, when you sanctioned the revolt from the Romans; next, when you advised the alliance with Hannibal; and thirdly to-day, when you delay and hinder the restoration of Capua to the Romans,” etc.

This, however, is enough on the present topic.

CHAPTER VIII.

*Of Varieties of Ownership, and the Classification thereof,
and how they are acquired.*

SUMMARY.

1. The origin of Ownership and its varieties is ascribed to the Law of Nations.
2. Classification of Ownership into Ownership of Jurisdiction, Ownership by a Group, and Individual Ownership.
- 3, 4. The origin of Ownership of Jurisdiction is referred to the Secondary Law of Nations.
5. So also Group Ownership.
6. Whether Individual Ownership originally belongs to the same Law of Nations.
- 7, 8. Whether, and how far, there was an original community of property.
- 9-13. Whether the whole sea falls under human ownership.
14. The three requisites of Original Acquisition.
15. The different names of Occupation, corresponding to varieties in object.
16. Capture of enemy property distinguished from Original Acquisition.
17. The opportunity for acquisition by occupation much restricted to-day.
- 18, 19. A wild beast caught in breach of the present game laws becomes the captor's property.
20. Such a beast is acquired by the buyer, and can not after the sale be taken away by the owner of the chase.
- 21, 22. A distinction, according as the buyer did or did not know the facts, and unless there be an express provision of the Law vesting in the owner of the chase the ownership of an animal captured in breach of the game laws.
23. How far the liberty of occupation is restricted in fowling and in fishing.
24. How far in the case of inanimate things.
25. As to derelict things, things captured from the enemy, and treasure-trove.
26. The objects of Accession, and its two kinds.
27. Accession to be ascribed in part to Positive Law and in part to the Secondary Law of Nations.
28. An island in a river: how far the mode of acquiring it is laid down.
29. Such islands are in different places given to the public treasury.
30. The constitution of the Emperor Adolphus on this subject.
- 31-33. A statement of the law with regard to river-beds.
- 34-36. What *arcifinium* is, and whether a change in the line of a river-bed changes the boundaries of kingdoms and territories.
37. The law of alluvion does not make any addition for the purposes of the public census.
38. The basis of Delivery is the owner's consent.
39. Consent Express and Tacit, and in what cases each is found.
40. Delivery, Succession, and Usucaption are modes of acquisition under the Law of Nations.
- 41, 42. In what sense this is true of Succession and Usucaption.
43. Grotius wrongly includes Testaments under the modes of acquisition.
44. Testaments of foreigners are valid as to goods situate elsewhere.
45. The *droit d'aubaine* excludes succession to the goods of foreigners unless the privilege of naturalization has been granted.
46. It is in itself unjust, but is justified by the principle of Reciprocity.
47. What Testaments are upheld by the Law of Nations.
48. In matters of commerce, Delivery is by consent necessary for the transfer of ownership.
49. Answer to Grotius' objections.
50. Whether Delivery is to be reckoned essential, without any distinction, and even for a thing not in the owner's possession.

That Ownership and its varieties are among the things ascribed to the Law of Nations is vouched for by Hermogenian (*Dig.* 1, 1, 5). But the exact meaning of this is far from clear; for it may apply to Dominion by

Jurisdiction, or to Group-ownership, or to Ownership by Individuals. The doctors make this threefold distinction in the use of the term. (Covarruvias, on c. *peccatum*, part 2, § 9, n. 8; Luis de Molina, *De justitia et jure*, tract. 2, 2 disp. 3, n. 7.) The meaning may, then, be: That under the Law of Nations jurisdictions began to be marked off one from another, one people having jurisdiction in one region and another in another. Or it may be: That under the Law of Nations groups of individuals began the practice of acquiring things for the group. Or, That the varieties of private ownership come from this Law each with its separate characteristics.

3 This first meaning squares best with the Secondary Law of Nations; for, after mankind had developed into various nations and the quest of more congenial modes of life drove these into different parts of the earth (as it is agreed, following Holy Writ, *Genesis*, ch. 10, v. 32, happened just after the Flood), it could not but be agreed that each nation should have law-making power and jurisdiction in the area which it occupied and tilled and in which it fixed its abode. There were so many nations, speaking different tongues, that they could not be ruled by one human governor, and individual peoples were, as a consequence, allowed, tacitly at any rate and by usage, to provide for the people and goods within their area, in the interests of a better way of life, by means of legislation and by erecting the Good and Fair into a legal system. Hence, says Brunnemann quite rightly, in his comment on *Dig.* 1, 1, 5, there flowed from the Law and Institutes of Nations the distinction of Dominions and Territories. Aye, and Usage shows that this must be extended to the sea-shore and to the waters that are boundaries between States; that is what Celsus had in mind when he said (*Dig.* 43, 8, 3), "Seashores under Roman sway are the public property of the Roman people." A gloss on this rightly makes it apply to jurisdiction.

5 I do not, however, deny that in the second sense above mentioned, also, the separate origin of Dominium may be referred to Law of Nations; for by the common consent and usage of the world the things of which a group has taken possession ought to belong to it and ought, meanwhile, to serve wherever possible the purposes of individual members of the group—where, that is, any things have been assigned to individuals to hold as their separate property. Therefore, the fields, woods, grazing-land, and forest-pastures which are in the occupation of any given nation were given into the dominion of that nation for the common use of individual members of it, as I have just said. But, for the avoidance of quarrels, that same Law adopted the principle of demarcating the territories of each such nation or group; that is, as Hermogenian says in *Dig.* 1, 1, 5, boundaries were imposed by the Law of Nations, with the obvious result of distinction being made between the territories of different peoples, just like the distinction between the lands of private citizens in States where communal ownership has not been retained.

6 The distinction of ownerships in the third sense can not be wholly referred to the Secondary Law of Nations; this is, indeed, possible in the case

of the goods of a group or nation which are divided among its members, as has just been said; yet that is not exhaustive of the facts, for we have all the various modes of acquisition whereby, soon after the origin of settled institutions, private persons began to hold things in private ownership. This it is which leads Grotius—and others follow him—to distinguish between Original and Derivative acquisition by act of party (*De jure belli ac pacis*, bk. 1, ch. 3, § 1). Grotius, by the way, ascribes acquisition by partition to Original acquisition. Now, it should more correctly be referred to Derivative acquisition by act of party, seeing that land can not fail to be divided between private persons unless we presuppose acquisition on the part of the group through whose act, of course, the land comes into private hands (such partition was practised formerly, and still is to-day in some cases), just as lands taken from the enemy are distributed among citizens and as the Roman Emperors not infrequently made grants of lands to veterans by way of reward (*Dig.* 21, 2, 11). Hence we see that private ownership of land is derived from the Primitive Law of Nations, called by some (see above) the Law of Nature.

This is a suitable place to ask (1) Whether there was an original community of goods. Justinus (*History*, bk. 14) thinks there was, saying, "Everybody had everything in common and undivided, as if it were one patrimony belonging to the people as a whole." Grotius agrees (*De jure belli ac pacis*, bk. 2, ch. 2, § 2), expounding the matter at some length. Others take the opposite view, such as Ziegler (on Grotius, place cited). Ziegler says that the ownership of this universe, given to Adam by the Creator, Adam being thus lord and possessor of the whole earth, came to Adam's children or descendants by their first father's gift or grant or assignment, as if under the law of *peculium*. I am in favor, however, of Grotius' doctrine; but I draw a distinction between community of ownership and community of user. There was not originally any ownership on Grotius' own showing, for in the same place he affirms that ownership came at first from partition or from occupation; and such community as existed originally could not be deemed a community of ownership, seeing that ownership springs from partition, and so could not, of course, exist in the condition of community; otherwise the prime origin of ownership could not be ascribed to partition. And as regards such ownership as came from occupation, that presupposes that the occupied thing is a *res nullius*, that is, belongs to no one, and this excludes the idea of communal ownership. As, however, primitive man made promiscuous use of the things that were not occupied by others, I see nothing to hinder our agreeing with Grotius that there was in this sense an original community of goods. The gift made to Adam is no obstacle, both because there is no sure warrant for it in the words of Scripture and also because the Divine grant of the use of meats and oil and fruits of different kinds was not made in the singular number to Adam individually, but in the plural number, and therefore rather to mankind in the person of our first

parents; and also, lastly, because the origin of human dominion must be sought, not in this Divine grant, but in another made to Noah and his sons after the Flood; and from this point of view it is indubitable that by the words and intent of Scripture what was granted to mankind was rather a faculty to take possession than dominion by the grant itself.

9 (2) A second question that may well be asked is about the sea: Does it all fall under human dominion? Grotius says No, *De jure belli ac pacis*, bk. 2, ch. 2, § 3, where he founds on moral and natural Reason the declaration that the sea remains undivided for mankind, seeing that mere use of it is enough for all nations, and also because its vast size precludes occupation of it by any one. Ziegler, in his *Comment* on Grotius, denies both these propositions; and Grotius himself (bk. 2, ch. 3, § 10) inclines to base on human institution, and not on Natural Reason, the fact that the sea is not and can 10 not lawfully be occupied. Herein Grotius can easily be cleared of contradiction; for in his § 3 he is speaking about the ocean which surrounds the earth (and that is what we are asking about here), while in his § 10 he is dealing with special seas, the right over which may belong to private persons (*Dig.* 47, 10, 14). If it does not, this is by human institution or by custom, not in the nature of the case or by Natural Law; for by this there is no reason why the owner of the land on both sides, if there be one, can not thereby acquire the ownership of the intervening sea (Grotius, place cited, § 10 and preceding § 8).

If, however, we look into the matter, we see that Grotius' doctrine about the inapplicability of occupation and partition to the sea is by no means unassailable. And they especially impugn it who, on mathematical principles, think that the sea admits of division by reference to the position of the stars. Now, if it admits of division, why may not separate parts be occupied and be transferred by their possessors from one to another, and even to one and the same person, or be so occupied, or have been so occupied in times past when they belonged to no one, that in that way the whole sea falls into ownership? 11 But political conduct can hardly receive support from the geometric admeasurement of a thing which as a whole and in all its parts can not be applied to the use of one and the same person. We might as well say that the center of the earth can be acquired and possessed by man because the dimension of the earth's radius is known! And so I think Grotius' assertion sounder; namely, that the whole ocean does not properly admit of ownership, seeing that all its parts are hardly accessible, or at any rate not so that a person can live there with an intent to possess them, because of extremes either of heat or of cold, so the mental element required by Natural Law for acquisition or possession must be wanting.

True, in obtaining possession of an estate there is no need for the party to walk over every particular bit of the soil, it being enough that he should 12 enter on some one part of it with intent to possess (*Dig.* 42, 2, 1, 1). Yet the sea is not like this, because of its almost unapproachable vastness. A man

who has entered on a part of an estate can easily enter on the parts adjacent, and so the intent to possess them can be presumed; but it is not so with the vast expanse of ocean, otherwise we should have to admit that a single voyage, coupled with intent to possess, would confer the possession of the whole ocean, a thing ridiculous in itself and contrary to the Law of Nature. Even 13 if a voyage should be so successful as to cover the whole ocean, as that of the Englishman Francis Drake, in the last century, is reported to have been, possession could not be deemed taken of the ocean and all its outlying parts to which the ship may have been driven by the force of the winds, however much the navigators may have wished to base a possession thereon, because, over and above the intent to acquire, an actual seizure is required. Nor can the admitted exception whereby, in some special cases, the mental element is enough by itself (*Dig.* 41, 2, 1, 21) be extended to the case of the whole sea, which Nature has made common to mankind and has given to it in undivided form. Moreover, *Dig.* 42, 2, 1, 21 is not dealing with the acquisition by Occupation of things common to mankind, but with the acquisition by Delivery of things already owned.

So it follows that for the Original Acquisition which the jurists call 14 Occupation, three things are required: (i) The object must belong to no one; (ii) It must be susceptible of human ownership, and, without any breach of Natural Reason, it must be possible to exclude other men from the use of it; (iii) The occupant must indicate by some adequate external sign or deed his intent to possess and to acquire.

Next, Occupation takes now one name and now another, according as 15 the objects of it differ. In the case of wild land-animals, it is called hunting or capture by hunting; in the case of fish and water-animals, fishing; in the case of flying-animals, fowling; and in the case of amphibious animals, the mode of capture determines the name, the occupation being treated in one case as hunting and in another as fishing; lastly, in the case of inanimate things like treasure-trove, pearls, stones, etc., it is called finding.

The case of captured enemy property is not inconsistent with what has 16 been said; this property may be lawfully occupied, although it does belong to some one. This acquisition, however, is not a variety of Original Acquisition, but must be put under the Secondary Law of Nations, whence comes all the law of war. The term Occupation, then—covering, as it does, enemy property—is wider than the term Original Acquisition.

It must be observed that the natural liberty of Occupation, which we 17 have been speaking of, is much restricted by the laws and customs of different States, and especially by those of our Germany. For at the present day it is not open to every one to hunt everywhere, but only to Princes or their deputies or grantees, or those who have otherwise obtained a valid title to hunt. To ordinary persons, hunting is forbidden by constitution of the Emperor Frederick I. This constitution can be found in the *Consuetudines feudorum* (bk. 2, 27, 5, at *Nemo retia*), and it is in full force to-day, except that the

hunting of wild boars, which was expressly allowed in the constitution of Frederick, is now forbidden by custom and provincial statutes.

18 But although this is so, and although the prohibition to private persons to hunt wild beasts can be upheld, as Grotius shows (place named, 2, § 5), yet I concur entirely in the opinion of Covarruvias that a beast which is caught in breach of the prohibition becomes the property of the captor, although he is liable to punishment and the beast may be taken away from him. The reason is, that a wild beast which ranges the woods and is in a state of natural freedom is yet nobody's, even to-day, and so will pass to the occupant despite the breach of the prohibition, on the same principle as that on which, according to the better opinion, one who enters on an estate in violation of the owner's prohibition becomes the owner of anything that he captures there, despite the wrong which he does in hunting in breach of the owner's prohibition. See Covarruvias, *Relectiones* on c. *peccatum*, part 2, § 8, n. 2, where he adds another reason, namely, that the prohibition admittedly only goes to the act of hunting, and not to the acquisition by means of hunting. These two things are certainly quite distinct.

19 We have a parallel when the Law forbids a certain kind of contract but does not forbid acquisition in virtue of such a contract; for example, citizens may be forbidden by Law to sell corn for export, but this does not prevent a seller from becoming, under the contract of sale, owner of the price paid, although he may be liable to pay even a larger sum by way of penalty (*Cod.* 4, 40, 3; and 4, 41, 2).

20 A corollary to this is that a wild beast which has been caught in breach of the law against hunting, and been sold, becomes the buyer's property and can not be taken away from him by the owner of the chase, because the latter was not, at the time of the actual taking, invested with any real right (*jus in re*) by which the captor forfeits the beast to him as a penalty. No obstacle hereto is furnished by the fact that a different rule prevails with regard to conduct in fraud of taxes (*Dig.* 49, 4, 14). The principle of this is quite different; for, as the *Digest* says, the thing in question ceases by the very act in fraud on the taxes to belong to the former owner and is acquired by the Treasury; but by the forbidden act of hunting, the captured beast does not cease to belong to some former owner (for there was none), but it begins to belong to some one (namely, to the occupant), and, as we have already seen, is not acquired for the lord of the chase by the force of any rule of Law or by the principles of the Law of Nature or of Nations. We can not, then, argue from the case of fraud on the taxes to the present case.

21 Two qualifying remarks, however, must be made. (1) A distinction must be drawn according as the buyer knew or did not know the facts. In the former case he takes the thing with all its faults (by inference from c. 11, X. 2, 1); and so the beast caught in breach of the prohibition can be taken away from him. But this does not hold of him who bought in ignorance of the facts. He is held by the Law of Nations to become indefeasible owner

of the beast so caught and so bought by him; while he who buys with notice of the facts has a voidable title only, and the captured beast can be taken from him, not, indeed, by the ordinary remedy of an owner asserting ownership (*vindicatio*), but by a decree or sentence of deprivation. And in support of the contrary view no reliance is to be placed on the text of *Cod.* 6, 43, 3, 4, where the only redress open to a buyer without notice was an action on breach of warranty of title (*evictionis*) against the seller; for the passage named was dealing with a case where the thing had been alienated by an heir in breach of a trust contained in the will, and so the thing was taken to have really belonged at the time of sale to another, a point which, as already said, is wanting in our case.

(2) A further limitation which, I think, must be read into Covarruvias' ²² statement is, that in it the law or statute which forbids hunting must not vest the ownerships of those wild beasts which have been the object of occupation by private persons in the Prince or lord of the chase; for in that case the occupant is committing theft when he subsequently sells the animal which he has caught, it being another's, and, whether the buyer have or have not notice, the property can be sued for and reclaimed by the Prince or lord of the chase. It will, therefore, be useful if the statutes prohibiting hunting are so framed as to include that clause concerning the ownership of animals caught in breach of them. And I see no reason why a law to that effect should not be introduced, especially since it is clear that, as is actually effected in other cases by disposition of Law, ownership can be acquired for one person through the act of another. We see this done in the case of sons and slaves. Moreover, the Law is by itself adequate to transfer the ownership in things which belong to no one, even before they have been occupied, as Grotius rightly maintains (*De jure belli ac pacis*, bk. 2, ch. 8, n. 5, towards end).

More fully to set out the law of hunting, which depends on local usage ²³ or local statutes, would not suit my purpose here.

As regards fowling and fishing, we find that the liberty which is allowed by the Law of Nature is much restricted by the customs of nations, it not being allowed to take the better class of birds, such as becaficos and woodcock and thrushes, etc., or to fish wherever one pleases in public rivers, which are generally divided up by public authority among fishermen according to their districts, or are granted out in some other way by a superior. (See Stypmann, *Tractatum de jure maritimo*, part 5, last ch., n. 11; and Struve, *Syntagma juris feudalis*, ch. 6, aphor. 7, n. 10.)

The liberty allowed by the Law of Nature is similarly restricted in the ²⁴ case of inanimate things like gems, stones, pearls, the acquisition of which by occupation is to-day vested by special enactment in the Sovereign (Stypmann, aforesigned *Tractatum*, part 2, ch. 4, n. 111, onwards; Gryphiander, *De insulis*, ch. 31). What is to be said about an island rising in the sea? Our Roman Law would give it to the occupant (*Inst.* 2, 1, 22). This must, however, be taken to mean as regards proprietary rights; for jurisdictional rights over it

must belong to the sovereign of the sea, or possibly of the neighboring continent (by inference from *Inst.* 2, 1, 22, and Paolo di Castro thereon; *Dig.* 5, 1; Harpprecht, n. 3 on *Inst.* 2, 1, 22).

25 In this connection we also meet with derelict things and with goods captured from the enemy (*Inst.* 2, 1, 48; *Dig.* 41, 1, 5, 7). Immovables, however, are acquired rather by grant from the public authority than by occupation (*Dig.* 21, 2, 11). But treasure-trove belongs to this context (*Dig.* 41, 1, 31, 1; and *Inst.* 2, 1, 3), a person being entitled to the whole if he finds it in his own land, and to half if in another's land, provided the finding be in good-faith and not by magic (*Inst.* 2, 1, 39; and *Cod.* 10, 15, 1). To-day, indeed, but with a distinction in certain cases, treasure-trove is part of the sovereign's prerogative (*Consuetudines feudorum*, bk. 2, 56). To all this must be added the leading passage in Grotius (n. 5, above named), where he finely says, "Some property being necessarily set aside to enable Princes and Kings to sustain the dignity of their position, the German folk wisely determined to make a beginning with those things which could be dedicated to that purpose without causing any one any loss; now this applies to all things which are unowned."

So much about Occupation, the prime mode of Original Acquisition.

26 The next such mode is Accession, which applies not to ownerless objects but to things which are added to another's ownership on the ground of adjacency or adherence, and which, moreover, do not admit of occupation. Now, the doctors tell us that there are two varieties of Accession, the one Natural and the other Industrial. The former takes place by nature without any human act; the latter, on the contrary, requires human intervention. Of the Natural variety there are three instances: the island rising in a river, the river-bed, and alluvion. Of the Industrial variety there are several instances: by planting, by building, by mixing (*commixtio*), by blending (*confusio*), by making a new species (*specificatio*), by writing, by painting, and so on. All these are dealt with in *Inst.* 2, 1, although some seem to belong rather to Positive Law than to the Law of Nations.

27 Further, the so-called Natural variety of Accession should in my opinion be ascribed, not to the Primitive or Natural Law of Nations, as Grotius calls it, but to the Secondary, which owes its introduction to the consent of nations; for the acquisition of an island that rises in a river or of a river-bed by the adjoining occupiers implies a distinction of ownerships. So also in the case of alluvion.

28 Leaving, however, the question of origin, let us now deal with the objects themselves; and first about the island. This only refers to an island formed where a public river changes its bed and land is left by the division of the waters, which afterwards unite so as to surround it. It does not apply to land which is part of the dry land, and which is cut off from it by the river taking an entirely new course; for by the Law of Nations the land in that case remains the property of its former owner, as Pomponius rightly asserts in

Dig. 41, 1, 30, 2. How an island so formed in a river is to be divided among the adjoining landowners, especially where it is formed in mid-stream, we are told by Paulus in *Dig.* 41, 1, 29. Consult also the special treatises of Bartolus and Gryphiander on the island-question. I, too, have dealt with the matter in a straightforward way in an as yet unpublished treatise *De jure rerum*.

It is clear that in various places river-islands no longer pass into private 29 ownership, but go to the Sovereign and to the profit of the Treasury. This is so in the case of the Rhine and the Danube, and other of the more celebrated rivers of Germany. On this topic there is extant a constitution of the Emperor Adolphus, wherein he awards islands of that kind to the Empire and to the Counts in whose territories they have risen; it may be seen in Goldast (*Constitutiones imperiales*, vol. 1, p. 315). All the same, the Law 30 of Nations is not utterly altered by the sanction mentioned, for it speaks only of Counts who have customs-houses in the river where the island is formed; if, then, the island be formed in other rivers, the contrary rule may still obtain. (See Oettinger, treatise *De jure et controversiis limitum*, bk. 3, ch. 3, n. 12.) And I take this constitution to affect only lands within the Empire; it certainly can not apply to foreign nations and kingdoms and provinces.

Further, the rule about river-beds, whereby the extent of our property 31 may be increased by a change in the course of the river, is also a rule of Natural Law. It is recognized that the area left dry thereby belongs to the adjoining landowners, by way of mitigation of, or compensation for, the inconveniences caused to them by the neighborhood of a river. This is 32 unquestionably the basis of accession in the case of river-islands also. If, however, we regard the simplicity of the Law of Nations, in this case of river-beds, the reason named is not equally conclusive in all cases; for the change in the course of the river means that some other person's land, or part of it, has for the first time become the river-bed, and I think it would be fairer to compensate this loss by giving the former bed to this man rather than to other neighboring owners who have not been so much injured by the change. But that is not the rule of the Roman Law. It certainly seems 33 fairer than anything else, as I have said, that, if and when the river resumes its original course, the second bed should not go to the adjoining landowners, for they may not have borne the inconvenience of the neighborhood of the river for any long time, but should return to its former owner, as if by a kind of postliminy. And our friend Gaius seems to have applied this same equitable doctrine where a whole area is occupied by the water and is afterwards uncovered again, when the river resumes its original course. (*Dig.* 41, 1, 7, 5; and add *Inst.* 2, 1, 24.) And if the case actually arose, that should be the decision, although Carpzov writes to the contrary (*Definitiones forenses*, part 3, 31, def. 14). It might be different, however, if the river receded very gradually, so that the case was one of alluvion rather (*Dig.* 41, 1, 38). Or the right in the river-bed might, by special enactment, belong to the Prince

and not to any private person; for it is clear from what we said about the island that a law to that effect might be introduced. (Add Carpzov, *Definitio-
nes forenses*, part 3, 31, def. 13.)

- 34 An extremely nice question arises, whether a change in the course of a boundary-river between kingdoms or States adds to the territory of the one and takes from the territory of the other. Grotius (*De jure belli ac pacis*, bk. 2, ch. 3, § 16) distinguishes between boundary-lands (*ager limitatus*) which have been granted as part of a grant of a whole (*universitas*) and *arcifinium*, which is a kind of unsurveyed land, the boundaries of which are indicated by means of rivers, lakes and mountains, according to Julius Fron-
tinus, *De agrorum qualitate*, p. 51; but here the matter which was dealt with is such that soil means the area of lands bounded by the river. Grotius, accordingly, gives a negative answer in the case of *agri limitati* and an affirm-
ative answer on the case of *arcifinia*. But if we are speaking of a total change
35 of river-bed, the correcter view is that no change in the boundaries of a kingdom is effected thereby, not even in the case of *arcifinia*, as Grotius also admits (ch. 3, § 17). But he takes the opposite view of that sort of change which amounts to alluvion; that is, where there is an imperceptible withdrawal of the waters, as happened with the Rhine near Strassburg. In this last-named case Grotius thought that the land added by the withdrawal of the water was under the same jurisdiction as the other lands of which it formed a part. I concur in this view, provided that this river so marking off kingdoms and territories has been settled and recognized as the boundary, absolutely
36 and in any event. If this proviso be not satisfied, then I think we ought to ask whether, supposing the change takes place with some rapidity, and in a small number of years a considerable tract of land is taken away by the river from one side, the case is not in equity that first mentioned, amounting to a total change of river-bed; for the nations have probably recognized that the boundary was the course which the river then took, and not any course which it might thereafter take to the no small hurt of the other side by reason of the greatness of the change, albeit an imperceptible one. (Ziegler, on Grotius, § 16.) But in the second of the two cases named, there is scope for the application of Grotius' assertion.
- 37 The right of alluvion as between private persons is, in Roman Law, so advantageous a mode of acquiring ownership that the estate augmented thereby does not even bear any new and higher tax (*Cod. 7, 41, 3*). Of this matter elsewhere.
- 38 We now come to the modes of acquiring ownership under the Law of Nations which are based on the owner's consent. We can not acquire another man's property without his consent, for to deprive another against his will of what is his runs counter to all Law. In order, then, that in our social life ownership in different sorts of things may be duly transferred, there must be an expression of the owner's intent to transfer or else an intervention of the
39 Law which is tantamount to such an expression of intent. In that way acqui-

sition of what belongs to another depends on either his express or his presumptive consent. It is express in the usual kind of commercial transaction, and also in testaments; it is presumptive in successions on intestacy and in acquisition by long use or by lapse of time, and where a grant of ownership is made by sovereign authority (though this last case belongs rather to Positive Law). In the cases last named, and others like them, the former owner does not give his consent expressly; yet he is presumed by the public authority to have consented, and this presumption takes the place of actual consent. Hence the saying that to allow one's property to be acquired by long adverse enjoyment (*usucapio*) is almost the same as to alienate it (*Dig.* 50, 16, 28). And elsewhere an authorization given by one vested with the power of command can take the place of a legally contracted obligation (*Cod.* 8, 22, 1). The same in other like matters.

We see, then, that besides Occupation and Accession there are three other 40 modes of acquisition under the Law of Nations, Delivery, Succession, and Usucaption or Prescription, all these being modes dictated to the nations by Right Reason, through the medium of Usage, as fit modes of transfer of ownership. We may acquire a thing, then, either because it has been delivered to us, or because we have succeeded to the right of a deceased person in it, or because we have used and enjoyed it for a long time.

The two last-named modes of acquisition are notoriously ascribed elsewhere to the Civil Law. This is quite correct if we are speaking of them as regards the qualities and requisites attributed to them in the Roman Law; but, absolutely regarded, it is not correct, for who can deny that by the Common Law of Nations other nations have laws of succession, and testaments, and acquisition by long user? Of course the details may not be the same: the seven witnesses, the subscriptions, the seals, and so on, of the Roman Law may not be required; and the order of succession on intestacy may not be quite the same; and the period required for the completion of usucaption may not be similarly put at ten or twenty years. It was in view of such details that Justinian (*Inst.*) put such institutes as these among the modes of acquisition under the Civil Law, although, as we have said, they belong by origin, and when considered absolutely, to the Law of Nations.

It is in just the same way that paternal power (*patria potestas*) is also 42 ascribed to Roman citizens alone (that is, in respect of the peculiar qualities and effects which it has in Roman Law), yet, absolutely speaking, other nations also had that institute. These laws or institutes of nations about prescription, testaments and successions on intestacy, prevalent in different places, are well explained and illustrated by Grotius (*De jure belli ac pacis*, bk. 2, ch. 8, § 2, and bk. 2, ch. 6, § 14).

All the same, here and there he leaves something to be wished, especially 43 where (§ 14) he puts Testaments among varieties of Alienation. Now, a testament does not take anything out of the testator's ownership, and it can at pleasure be revoked; and so this classification is unjustifiable, unless Grotius very improperly strains the meaning of the word "alienation."

- 44 It is, further, an almost universal law of nations that all citizens and foreigners may make testaments in the forms required by the Law of the place where they live, and that these testaments then extend their effects even to goods situate elsewhere. So it is written in accordance with common opinion, by Emanuel Suarez (*Recepta Sententiae*, letter T, n. 75), by Guy de la Pape (*Decisiones Gratianopolitanae* 262), by Gail (*Obs. ad process. jud. decisiones* 2, obs. 123, all), and by Johan van den Sande (*Res in suprema Frisiorum curia judicata*, bk. 4, tit. 1, def. 14, at the end of which he says that in Frisia the Senate has at different times given decisions to that effect).
- 45 That foreigners are allowed full liberty of testation within the Empire is quite unmistakable (*Authentica, Omnes peregrini*, annexed to *Cod. 6*, 59, 10), and this is followed in practice. There is, however, a notable exception where special rules of a kingdom give to the Treasury the goods of deceased foreigners, which they have within the jurisdiction. This obtains in France, under the name of *droit d'aubaine* (*jus albinatus*, or *albinagii*) ; in virtue of it the royal fisc succeeds to the goods of foreigners as against both testamentary and statutory heirs. (See René Choppin, *De Domanio Franciæ*, bk. 1, tit. 2, all; Bodin, *De Republica*, bk. 1, ch. 6, fol. 97; Dumoulin, *Ad consuetudines Parisienses*, § 43, gl. 1, n. 182.) But this does not apply when the deceased has obtained the privilege of (what they call) naturalization, which causes him not to be reckoned a foreigner at the time of his death.
- 46 This *droit d'aubaine* certainly seems unfair so far as it takes away from the lawful heirs of a foreigner, who may not have known anything about that law, the goods which he has left in the kingdom; yet, on the other hand, it is fairly employed against the subjects of France, in accordance with the edict *quod quisque juris*, even by those Princes and States which have not otherwise adopted the law in question. It may be urged that these subjects are innocent. My answer is, that it is the same in war: the subjects may for the most part be innocent; yet they themselves, and their goods also, are then by the Law of Nations liable to capture simply because they live under an enemy King or Prince. The case which happened a few years ago concerning the succession of the Lord de la Motte might here be urged, but in that case there was an overriding princely concession.
- 47 Another special point is, that some testaments are upheld by the Law of Nations, such as the testaments of Princes, of soldiers, of fathers in favor of children; and by Canon Law a testamentary disposition for purposes of piety enjoys the same privilege. But enough of this topic; to deal any longer here with succession or prescription would, I think, be out of place, most of the points which arise in connection with them falling rather under Positive Law than under the simplicity of the Law of Nations.
- 48 Delivery remains. This must, of course, be reckoned a mode of acquisition by the Law of Nations, when there is present in business transactions an agreement for transference of ownership between grantor and receiver (*Dig. 41*, 1, 9, 3). But Grotius does not concur herein (ch. 6, §§ 1, 2).

He thinks that Consent is enough by the Law of Nations, and that Delivery is not needed. Joannes Felden (note on Grotius, place named) proves the opposite well, although Graswinckel (*Stricturæ*) hardly agrees with him here. For really this is not merely a matter of Positive Law, but the Usage of Nations has introduced the rule in order to prevent any idea that ownership is transferred prior to delivery. And Reason favors the same rule because of the convenience in matters of business, and so there has grown up among nations a sort of mutually recognized obligation whereby no one is held to have actually alienated his property unless he has actually made delivery thereof.

There does not seem to be any force in the contrary cases adduced by 49 Grotius. One is from the Law of the Visigoths. According to this there is held to have been actual delivery of the subject-matter of a gift directly a deed of gift is in the hands of the donee. Another is from the old Roman mode of alienation by copper and the scales. To these I answer (1) That they are matters of Positive Law and not of the Law of Nations, between which two Grotius often distinguishes; (2) That in these cases there is at any rate a feigned delivery, which is quite enough in certain cases indicated by Law or admitted in Custom. There was, as a matter of fact, no need for Grotius in the first case to pray in aid the Visigothic Law; for we see the same rule laid down in Roman Law (*Cod.* 8, 53, 1), this being perhaps the source from which the Visigoths took the rule after their occupation of Italy. As to the time-old case of alienation by copper and the scales, this belonged rather to last wills than to true alienation of ownership (by inference from *Inst.* 2, 10, pr.)

However that may be, I think a distinction can rightly be drawn accord- 50 ing as the owner is himself in possession of the thing which he alienates, or a third party, to the effect that in the former case there must be delivery either actual or, at any rate, feigned or constructive, in accordance with the provisions of the Law (*Cod.* 4, 49, 8; and *Dig.* 18, 1, 74). That in the latter case the expression of intent is enough is an inference from *Dig.* 23, 5, 16, whatever others may say to the contrary. For not only by the Civil Law but also by that of Nations, the reason of the thing is conclusive that he should not be deemed to make a transfer who, having the thing in his possession, keeps it and merely indicates by words his wish to transfer it (l. 16, above); whereas he who, being out of possession, expresses his desire to transfer, does all that in him lies to get rid of his ownership. The latter must, then, be said to be capable of transferring his ownership by mere intent and assent, and to have done so by that very fact.

On this matter let this be enough.

CHAPTER IX.

On the Origin of Kingdoms and the Ways in which they are Acquired under the Law of Nations.

SUMMARY.

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| <p>1-3. Origin of Kingdoms in consent proved.
 4. Various ancient and modern Kingdoms referred to.
 5. What modes of acquiring a Kingdom are known to the Law of Nations.
 6. Election of a King may, as regards the electors, be in three ways.
 7. Diverse also as regards the elected.
 8. Election the more ancient way of acquiring a Kingdom.
 9. By the Law of Nations the majority of votes determines the election of a King.
 10. The elected derives his regal right from his approval of the election.
 11, 12. Whether the undertakings and oath with regard to the administration of the Kingdom, and the act of coronation also, are matters of the Law of Nations.
 13, 14. Succession to the throne: its nature.
 15. A Kingship which devolves by succession may also be one of limited power.
 16. Whether the succession to the throne can be passed on by will or on intestacy.
 17. Whether the successor ought to be of the line of the first occupant.
 18. How far seizure in war is a mode of acquiring a Kingdom.
 19. The transference and alienation of a patrimonial Kingdom permitted without any assent of the Estates.</p> | <p>20. Otherwise with a non-patrimonial Kingdom.
 21. The transference of a Kingdom is sometimes full, sometimes less than full, or only as regards the <i>dominium utile</i>.
 22. Whether the King in a feudal Kingdom has rights of Majesty.
 23. An exception.
 24, 25. To what extent sovereign power can be acquired by prescription.
 26. What Kingdoms are patrimonial and alienable; what not.
 27. The result of this.
 28. A Kingdom is as a rule indivisible.
 29. In the succession to a throne, preference is given on grounds of male sex, of lineal descent, and of age, there being by the Law of Nations no succession in right of collateral relationship.
 30-33. Whether primogeniture obtains under the Law of Nations in Kingdoms which devolve by succession.
 34. Whether illegitimate sons may succeed to the throne.
 35. Whether sons born before their father was King are preferred to those born after.
 36-38. Whether descendants through females of the royal line succeed to the throne under the Law of Nations.</p> |
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I The prime origin of Kingship was in the virtue and moderation of those who were put into that office by election, as witness Justinus' *History*, bk. 1. It is there said that Ninus was the author of a change in this traditional custom of nations, through his lust of rule; but there are not wanting those who attribute the beginning of Kingdoms to Nimrod, because in the Scriptures he is called a mighty hunter before the Lord (*Genesis*, 10, 9), from which passage Bodin, *De Republica*, bk. 11, ch. 3, draws the inference that the beginnings of empires were violent, and that men were compelled by force to recognize the new form of government, in which many different families were subjected to one and the same head, contrary to natural liberty. Certainly it cannot be denied that the earlier and almost paternal kind of rule was more natural.

But it is said that if we look more carefully at the question, we may 2 perceive, with Aristotle (*Politics*, bk. 1, 1), that the origination of Kingdoms was perfectly consistent with the dictates of Right Reason. For after mankind had much increased in numbers, it seemed advisable, nay, necessity and the desire of a better kind of life demanded, that the government of men should not be in a system of individual families—a form and method of living which, with the growth of wickedness, had at last became a source of danger to mankind—but upon a new method, wherein many families were associated together under the rule of one.

This is the probable origin of Kingdoms, under the guidance of Reason 3 and by the assent of subjects. This is that Law and Institute of Nations whereby, according to Hermogenian (*Dig.* 1, 1, 5), nations were separated one from another and Kingdoms were founded. Hence we have Philosophy in Boethius' *De consolatione* finely asserting that a Kingdom is naught else than "the consent of the people to the ruler's scepter"; and Livy (bk. 2) saying, "the whole force of empire is from and in consent." This being so, we are warranted in ascribing the beginnings of Kingdoms to the Secondary Law of Nations.

Among the most ancient of these Kingdoms are included the Assyrian 4 or Babylonian and the Egyptian; and we read how there were many more—the Israelitish, Syrian, Median, Persian, Greek, and Roman—which were founded in the train of war or through the migration of peoples. And those which flourish to-day are many in number. In the Christian world we have, for instance, the Romano-Germanic, the French, the Spanish, and the English; under the religion of Mahomet, we have such as the Turkish, the Persian, the Tartar, the Indian, etc. Any others, which there may be, belonging to primitive paganism, are of lesser note.

So much, briefly, about the origin and development of kingdoms.

The modes of acquiring Kingdoms under the Law of Nations are: 5 Election, Succession, Conquest, Alienation, and Prescription. Of these, the two first-named are especially suitable to a vacant Kingdom, and the others to a Kingdom which has either been wrested from the hands of others by force and arms or has been received from a consenting transferor. Of each of these in turn.

Election to a throne is, as regards the electors, of three kinds. For 6 either it is done by the whole nation which the King is going to govern, as seems to have been that primitive election of Kings which Aristotle and Justinus (place named) deal with, but which is practically obsolete now; or the election is by the nobility or by the whole array of Senators or Princes, as in Poland; or by some definite and more eminent Princes, as in the Romano-Germanic Empire. This last-named mode of election is even better than the second one; for the greater the number of electors is, the more difficult it is to arrive at an agreement, and hence factions arise and long delays in filling up the position, which work signal mischief to the State. Our Germany fur-

nished a most notable and fatal illustration of that evil in what happened after the death of the Emperor Frederick II 460 (?) years ago.

7 Again, the election is of different kinds as regards the persons who may be elected. For either it is permissible to elect any one as King or the election is restricted, the election being correspondingly called quite free or of restricted choice. This restriction may be within a given nation, as is the election of an Emperor in Germany on the testimony of the Elector of Mainz in Sleidanus' *De statu religionis, etc.*, bk. 1; or within a given family, such as in Poland, the Jagiello family.

8 Now the mode of acquiring a Kingdom by Election is native and most ancient; for both Succession and Transference presuppose an election in the person of the first holder. Aye, and so, too, does even title by Conquest, because the Kingdom which is to be acquired must first have already been acquired by Election and Consent—at any rate, with the exception of the case in which men living in bands without any civil jurisdiction over them have been compelled to submit to a King's rule, as of old happened to the Athenians at the hands of Cecrops and to the Cretans at the hands of Minos, and as also has happened to certain Indians of the West whom the Portuguese and Spaniards and others have subdued.

9 It must be observed that, if there be a difference of opinion among the electors, then by the Law of Nations he ought to be deemed elected who has obtained a majority of votes, there being then no other way of settling the election; for when the electors are manifestly and finally at variance with regard to the person of the King, either an indefinite interregnum must occur or the King must be nominated by one part of the electors and by their authority. Now, it is hardly probable that in a case of doubt the minority of votes will be deferred to; so the consequence is, that even by the Law of Nations the majority must be utilized for the business of electing a King. And so we see that this is to be observed not only in the election of an Emperor under the provisions of the Golden Bull, but also in other Kingdoms.

10 Further, even when an election has taken place, it does not of itself bestow regal rights; but an approbation of the election, or undertaking of the regal rights by the person elected, does this. For, in point of fact, the vesting of regal rights by way of election is a kind of agreement; and so it is necessary that the person elected should forthwith be notified of his election and should embrace the offer thus made to him of the power and office of King by some signification of assent. The administration of the Kingdom might seem so laborious and hazardous to the person elected that he might prefer to put it from him, as in bygone days Otho the elder (?) did after the extinction of the Carolingian dynasty of Emperors and as, after the death of Frederick II, Richard of England and Alfonso of Castile are said to have done, they decisively repudiating the dignity of Cæsar which had been offered to them by the Electoral Princes. And so, whenever we say that any person has been elected King, this must not be taken without qualification, but the assent of the person elected must be added by implication.

And it is usual for the Princes, or Estates of the realm, who have elected 11 the King, to bind him, generally by contract and an oath, rightly to administer the commonwealth, to confirm and guard the privileges of individuals, to take under his charge the public safety and well-being, to dispense justice in accordance with Justice and Equity or according to Law, and so on. This formula is very commonly employed when a King is binding himself under oath to administer his realm well; but it is not, in my opinion, a matter of precise obligation under the Law of Nations, because by this Law agreements of that kind are accidentals rather than essentials in the election of a King, though it is otherwise if we are speaking of public rights, where such pacts derive, from definite institution and long observance, such a validity that they must not be omitted.

Moreover, a King is bound, by the implied intent of his people or the 12 Estates, to administer as a good man would the realm which has come to him by election. For if such a condition may be implied in a private contract at the discretion of the parties (*Dig.* 17, 2, 76; and 38, 1, 27), how much more must it be observed in the public affairs of a Kingdom. It is indeed quite clear from history that the elective Empire of Germany stood and was administered for more than one century without any of the Capitulations, if we omit a few of the more general ones which may be seen in Goldast (*Constitutiones imperiales* (?), bk. 1, *Land und lehen rechte*, ch. 21). But, though the Law of Nations may contain precise requirements about the agreements between King and Estates at the beginning of a reign, the practice observed in antiquity by our Germany was probably different. More emphatically still must the same thing be said about the act of royal inauguration commonly called a Coronation, wherein the elect person displays himself to the public gaze in the robes and insignia of royalty. I take this ceremony to be more of a solemn ritual than anything required by the Law of Nations.

Succession is in this connection the shifting of the regal position and right 13 from a deceased King to his heir in unbroken sequence. This successor is either issue of his body or not, according to the different rules of different Kingdoms, of which more anon. Grotius (*De jure belli ac pacis*, bk. 2, ch. 3, § 10) rightly says that Succession is not a title to the throne such as creates and determines the form and character of the monarchy, but is a continuation of an existing state of things. This being so, why do we give it as a distinct mode of acquiring a Kingdom? This knot will easily be untied if we scrutinize the position of one who succeeds a first holder. For, suppose first that we are speaking of an elective monarchy: Here it was the merits of the first person who was elected that raised him to the dignity in question, and his descendants came to the throne in right not of Succession from him, but of a new Election, although, other things being equal, they were quite properly preferred to other persons because of the memory and influence of their ancestor's merits. Or suppose we are speaking of a realm acquired by arms 14 or otherwise: The legal position will be the same; the successor to the throne

may rely on the merits and right of the first occupant, yet the proximate reason of his own elevation to it (that is, of the extension to himself of his predecessor's right) is neither Election nor Conquest, but a legal Succession founded on the compelling character of descent or otherwise. This marks off Succession from Election and from Transference, as a distinct mode of acquiring a throne.

15 We see, then, that not every monarchy which devolves by Succession is an absolute one; for it is continued in successors in the same shape as it came to the first holder, and therefore if, when he obtained it, it was not one of absolute power but was restricted by the terms of his election, it will be the same in the hands of his successors. (See Grotius, place named.)

16 Again, whether and to what extent the succession to a throne can pass by Will or on Intestacy, and what the order among possible successors is, these are questions to be solved in different ways in different Kingdoms. For a patrimonial Kingdom may even be transferred by Will. That was how, in olden days, Attalus, King of Pergamum, could make the Roman people heir of his Kingdom. Or such a Kingdom may on Intestacy devolve on any persons of the holder's blood, according to their degrees of kinship, and even 17 on one not of the issue of the first holder. See Grotius, *De jure belli ac pacis*, bk. 2, ch. 7, § 12, where he adds that the throne will go to the next of kin to the last possessor, though they may not be of the blood of the first King; this, however, Grotius thinks must be ascribed, not so much to the common Law of Nations as to local usage. I should myself hold the opposite concerning the custom in Feudal Kingdoms which pass under the common Feudal Law; for there, as in other feuds, the successor must show not only kinship in blood with, but also lawful descent from, the first tenant (*Consuetudines feudorum*, bk. 2, 11). This matter must, then, be settled in one way for a feudal succession and in another for a royal and non-feudal succession. The rules of the two also differ in that adoptive children may succeed to a throne, as of old in the Kingdom of Numidia, where Jugurtha succeeded Micipsa, and as in the Kingdom of Naples, where Alfonso succeeded because of his adoption by Queen Joanna. (See Grotius, place named, n. 12, where he gives other instances from antiquity.) Now, this does not obtain at all in the succession to feuds (*Consuetudines feudorum*, bk. 2, 26, at *adoptivus*).

18 Next comes Conquest. This is considered by the accepted usage of nations a lawful basis of empire, provided the war was just, a matter to be dealt with in its place hereafter. In Livy (bk. 30), Scipio the Elder well says, "Syphax was conquered and captured in a war undertaken by the Roman people; and so he himself, his wife and Kingdom, lands and towns, and so on, are the spoil of the Roman people." A distinction must, however, be drawn between those who have been utterly conquered and those who have surrendered on terms. The latter are only subjected to the empire of the conqueror in the manner settled by the agreement, but the former absolutely. For more, see the chapter below on the right of the conqueror over the conquered.

Transference occurs in virtue of the assent of a King who alienates his 19 Kingdom to another, where it is this which gives the receiver the beginning and foundation of regal right. Two points call for remark. (1) It depends on the particular Kingdom whether the consent of the Estates is or is not required in that alienation. If the Kingship be absolute and patrimonial, as it is when it arises without limitation or condition from occupation or from conquest, the King can dispose of his Kingdom and any part of it in his own right, and therefore he ought to be allowed to alienate it in right of ownership, without the assent of the Estates. It is the same where the people has expressly conferred this power on the King; for if a tacit consent, arising out of the preservation of the conquered people and the indulgence of the conqueror, can give the right of empire with power of free alienation, why should not the expressed intent of a free people produce the same result?

But if, on the other hand, the Kingdom is not a patrimonial one and has 20 not come to the occupant with any provision for free alienation, then, whether it be elective or have devolved by succession or have been obtained by alienation, the King has no power to alienate either the whole or any part of it without the advice and assent of the Estates of the realm, however absolute his power may be in the despatch of public business in other respects. For this is a matter of such moment that the welfare of the Kingdom clearly is dependent on it. And so when, in the last century, Francis I of France made a treaty of peace in which he undertook to transfer certain parts of his Kingdom, and notably Burgundy, to the Emperor Charles V, he shortly afterwards excused himself on the ground that Kings of France were prevented by the Salic Law, as a fundamental law of France, from alienating any part of that realm without the consent of the magnates. Random alienation certainly did a great deal of harm in days gone by to our Germany.

(2) It must be noted that a transference of a Kingdom may be either 21 full and without any reservation, or less than full—that is, in such a way that the transferor reserves to himself certain rights in the Kingdom after transference. This happens, for example, in the relation of Suzerain and Vassal, like that in which, in olden times Masinissa and Herod, and other Kings to whom Kingdoms were permitted, stood to the Romans. Or it may happen in the feudal relation, when a Kingdom or part of a Kingdom is granted to another to hold as a fief, as of old Dauphiné in France was granted by the Romano-German Emperor, and the Kingdom of Bohemia also, which in more than one place in Lundorp is called an ancient fief of the Empire, and with which King Ottocar was invested by the Emperor Rudolph I. Another example at the present day is the Kingdom of Naples and Sicily, which the King of Spain holds of the Roman Pontiff. In this case, I have no doubt that the King may enjoy the rights of Majesty, although his Kingdom be a fief; the Kings of Spain, indeed, feudal though their Kingdoms be, undoubtedly make laws for them freely, strike treaties, declare war, make peace, and exercise other like rights of sovereignty, without either advice or command from the Pope. So also the Sforzas, Dukes of Milan, were vassals of the Emperor

and yet, in virtue of a clause in their investiture, they could exercise in that large Duchy all the rights which the Emperor exercised elsewhere in the whole Empire.

22 There is, then, no absurdity in the possession to-day of true rights of sovereignty by one who yet is and remains the vassal of another. This is, indeed, the case, where the vassal is so vested with the practical lordship (*dominium utile*) of a realm—which implies the utmost force and effect of sovereignty—that he can exercise it, so far as rights of Majesty are concerned, independently of the consent of his directly superior lord, despite the fact that he always remains bound to him by the fealty wherein the essence of the fief consists. But this, I admit, must be taken with a pinch of salt; for where that feudal tie genuinely includes Subjection, as in the fiefs of France and the principalities of Turkey, it is impossible for one to be at the same time Vassal and true King, unless the terms of the grant (or what comes to the same thing, namely, ancient and uninterrupted usage) expressly provide otherwise.

23 Lastly, what I have said about Subjection obtains in all those cases outside feudalism in which a ruler recognizes a superior, although in consequence of that dependence the realm is barred of sovereignty by the Law of Nations. It is in the sense just named that I understand Hobbes (*Philosophical rudiments concerning Government and Society*, ch. 2, § 4), and also Pufendorf, who mentions him (*De jure naturæ et gentium*, bk. 7, ch. 3, § 7), to the effect that there ought to be a remission of the feudal tie by the King who is the Lord of the fief, with a view of enabling the Vassal to become a true King. This, of course, is sound, if we are speaking of the tie of Subjection; but it is not universally true, for there is the tie of Fealty, as has just been explained.

24 Prescription also must be named as a mode of acquiring sovereignty. So Grotius thought (*De jure belli ac pacis*, bk. 2, ch. 4, §§ 1, 2, onwards).

In §§ 7 and 9 he reckons that time beyond memory is for this purpose enough by the Law of Nations. But in my view we should distinguish between prescription of provinces or of holdings and prescription of the sovereign power as against the people. The former undoubtedly goes on the principle of time beyond memory, even maybe of less if the circumstances are clear as to the intent of abandonment. The examples given by Grotius (place named) show this, because, if it be a free people that is in possession or quasi-possession, it is understood as remaining the same for the period of time beyond memory (*Dig. 5, 1, 76*); or if it be a King, the time of himself and the times of his successors can be added together, so as to make up between them the immemorial prescription required for acquiring a Kingdom or territory or province.

25 But there clearly is a different principle in prescription of sovereignty, so far as it operates against the people; for, if any one does acts of sovereignty without title, it is inevitable that for some time either the people consent to his rule, by knowingly obeying it, or they object to it and repudiate it. In

the former case, because of their tacit consent as expressed in their acts of obedience, the ruler would base himself on the presumptive rightfulness of his rule and there would be no need for any further prescription; and so no longer time would be required for acquiring sovereign rights than suffices to demonstrate the intent of the people and the character of their obedience. In the latter case, prescription would be interrupted; moreover, the prescriptive period would never be completed, for the usurper of course could not himself satisfy the Grotian requirement about living memory, nor could his successor join together their two periods of tenure because of the initial vice of violence which tainted that of his predecessor.

Some notable results follow from what has been said: (1) That, as a 26 rule, every Kingdom which has been obtained by election, or succession, or transfer is inalienable, unless the contrary appears from the mode of its erection or from constitutional laws. But a Kingdom which has been obtained by war is, on the contrary, as a rule alienable and entirely patrimonial, unless the contrary appears in the terms of the surrender. For there is a presumption in favor of a conqueror that he has made the amplest use of his victory that the Law of Nations allows, and so the proof is on him who asserts that the treaty of surrender contained some reservation or mitigation. Herein this mode of acquisition differs from those first named. Important consequences 27 flow from this; for in an alienable Kingdom the father can make appointments and dispositions, whether by disinherison or by abdication, to the prejudice of his children. This is not so in an inalienable Kingdom. (See Grotius, chapter cited, §§ 25, 26.)

I gather (2) That as a rule a Kingdom is indivisible, unless there is 28 some definite provision to the contrary, made by the King in a patrimonial Kingdom, and in other Kingdoms by the people or those in whose hands the required power is vested; for the presumption in case of doubt is always in favor of the intention that the government of a realm shall continue to be of the same character as it is, and shall remain undivided. (See Justinus, bk. 21, ch. 1.)

I gather (3) That on the same reasoning the rule for settling the succession to the throne is to give a preference to the male sex and also to age among the descendants of the first holder. This is set out in detail by Michael d'Aguirre in his *Responsum pro Philippo secundo Hispaniae rege* (p. 2, n. 24). And so we reject the principle of succession among all descendants of the blood which would prefer female descendants of the blood to other males (on this see Grotius, chapter cited, § 22); for if it obtains anywhere, it must be attributed to the Positive Law of the nation in question rather than to the true Law of Nations, which abhors the rule of women as a thing too frail and exposed to many mischances.

Now, what about Primogeniture and the question whether Kingdoms 30 devolve by it under the Law of Nations? Grotius (chapter named) distinguishes according as the succession is to a throne that goes to descendants only or to one that devolves otherwise, and in this latter case according, also,

as the Kingdom is or is not divisible. In the first case, he says primogeniture applies by the right of representation; in the second case, there should be a partition; in the third case, now to the eldest son of the elder son, and now to the younger son, according as the first- or last-named be the older—and he adds that the same solution applies when, the question is not between the son of the King just dead and that King's brother, but between the brother of the
31 dead King and the son of another predeceased brother. I think, however, that by the ancient Law of Nations there was no general rule that primogeniture applied to Kingdoms. The very fact that different nations have different rules about it, prevents its being ascribed to the Law of Nations at any time
32 when there was such diversity (by inference from *Dig.* 50, 17, 34). For it is a weak argument to base primogeniture on the right of representation, seeing that it does not touch the question of age and personal qualities, which latter are of the utmost importance in the administration of a Kingdom. Moreover, it does not follow, if an elder son who succeeds to the throne is fitter for it and for ruling than the second son, that the son of that elder son will have the same preëminence either in years or in wisdom over his uncle. It must be taken, too, that, when peoples found Kingships of the successory kind, they mean the royal scepter to pass always to the abler person, who is better fitted than others for so exalted a position; now, in case of doubt there is a presumption, on the ground of age, that the second son will satisfy these requirements better than the son of the elder son.

33 However this may have been in olden days, the modern Law of Nations undoubtedly, in my opinion, applies the doctrine of primogeniture in determining the succession to a throne. This is manifest if we enumerate the Kingdoms of Europe which adopt the successoral method, such as France, Spain, England, etc. And some outside powers, too, such as the Turkish, Persian, etc., also adopt it. There is reason in the acceptance of this rule by the nations; for if a Kingdom devolves according to age, without the strict application of primogeniture, a King will not devote the same pains to the care of his Kingdom's interests, seeing that after his death the throne may go, not to his children, but to his brothers or perhaps to collaterals of even remote degree. Nations of later times, then, showed their wisdom by thinking that individual Kings ought to feel constrained to the furtherance of the public welfare by the close tie of a profit to themselves which would also ensue under the principle of succession to the profit of their descendants. Now, this could not be accomplished otherwise than by excluding, through usage and tacit consent, second and later sons from the succession to the throne as long as there survived any male stock in the line of descent from the last King. And since, as already said, Kingdoms are as a rule indivisible, primogeniture ought certainly to be resorted to; for the principle of age, applied in this case without any modification, prevents the offer of the throne to a second-born during the life of his first-born brother.

34 We of course give such a definition of primogeniture as to make it apply to the eldest legitimate born son and not to elder sons born of a mistress;

for the prejudice against illegitimate children bars any intent on the part of the father or the Estates or the people to call them to the throne—unless perhaps where all legitimate issue is extinct, as when the Kingdom of Sicily came to Manfred in that way long ago; or where the father has made a contrary disposition, as Micipsa did in respect of Jugurtha (as we read in Sal-lust). A kinder destiny, unless the law of the land provides otherwise, 35 awaits those legitimate sons who were born before their father became King. And there is reason in this; for they are attually the King's sons, and the regal dignity which has accrued to their father ought to enure to them. A right opinion on this matter is given by Tiraqueau (*De jure primogeniture*, qu. 31) and by Grotius (place named, § 28). And a text in *Dig.* 1, 9, 5, is well in point here. And this view holds good, no matter what barbarous examples to the contrary may be alleged, such as that of Xerxes, who was preferred to his elder brother Artabazanes, the latter having been born before their father Darius became King (the story is in Herodotus, *Polymnia*); or such as that of the Turk Bajazet, who similarly excluded his brother Zizimus. (See on this question Arnisæus, *De republica*, bk. 2, ch. 2 whole of § 11.)

A more difficult question is whether the male issue of females of the 36 royal line may be called to succeed to the throne. I certainly think that by the Law of Nations they are not admitted if male issue through males survive; for the succession primarily belongs to the latter, but if there are none of them, there is room for doubt. In the inheritance of the Kingdom of Arragon, a daughter's male issue must be preferred, under a constitution of King Alfonso, to the daughters of males. (So we are told by Mariana, bk. 24; and thereon Grotius, place cited.) That was, however, a matter of Positive 37 Law. By the Law of Nations descendants through females can not, I think, be admitted (unless the fundamental laws of the country declare otherwise) in non-patrimonial Kingdoms, where it is improper, as contrary to the primitive institutions of the realm and to the intent of the Estates and the people, to entrust the commonweal to any descendant through females of the blood royal, and he perhaps a foreigner. But in patrimonial Kingdoms it is not 38 the same, in accordance with the presumed intent of the first occupant of the throne. For it is highly probable that he meant it so to devolve on his issue as that male issue through females should be admitted if there were no male issue through males, they being at that time the best fitted to rule of any of his issue. The assumption is like that by which a testamentary trust which is left under what is called a condition of masculinity goes first to male issue through males, and, if there be none of these, then to male issue through females. (Peregrini, *De fideicommissis*, art. 26, n. 22, at end; Mantica, *De conjecturis ultimarum voluntatum*, bk. 8, tit. 18, n. 43, at secundo etiam.)

Other questions of that kind, which Grotius (place named, § 32, onwards) subjoins from Manuel de Costa, seem to be settled rather by Positive Law than by the Law of Nations, as any one will easily see who studies Grotius' own answers thereto. Let what has been brought together of our own material, then, suffice.

CHAPTER X.

Of Republics and their Legal Institutions.

SUMMARY.

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| 1, 7. The origin of Republics.
2. What kind of State is the best, roughly.
3. Whether the joinder of a colleague in the throne alters the character of a monarchy.
4. The supreme power in a Republic is in the hands either of Senate or of people.
5. Rulers confirm with their assent public business done by others.
6. How a tacit consent in public matters may be inferred.
8. What peoples have preferred the liberty of a Republic.
9-11. When a Kingdom is turned into a Republic there must be a title by abdication.
12. The advisability of establishing by pacts the liberty of a Republic which has been set up by force.
13. That a Republic is free and that a Republic is in quasi-possession of freedom are different things. | 14, 15. Whether a pacification with an expelled King assures the freedom of a Republic by the Law of Nations.
16. To what extent things reserved to the sovereign pass to others on his abdication.
17. Whether a title to liberty by quasi-possession of liberty may be founded on a pacification.
18. What length of time is required for prescription of liberty, and how prescription is interrupted.
19. Whether prescription of liberty is needed when a King breaks the fundamental laws.
20-22. Whether a Republic may lawfully defend itself against powerful citizens who have broken no law.
23, 24. Whether, when a Republic is split into factions, the plebeians should give way, or the patricians and nobles. |
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I Not all nations have viewed kingly rule, the subject of the last chapter, with equal favor. Some, whose bent led them to put liberty first, did not entrust the control of the State affairs to a single ruler, but either kept it in their own hands or at any rate gave it to a large section of the community. This was the origin of Republics. And Machiavelli, in the preface to his *Prince*, includes every form of government ever known under either a principality, to which class government by a single person belongs, or a Republic, by which word Machiavelli means government by many.

2 There is much discussion among students of politics whether Monarchy or Polyarchy is the better, and especially about the so-called Aristocracy, as a variety of the latter. After the death of Cambyses and the slaughter of the Magi, the magnates of Persia discussed this matter, according to Herodotus (*Thalia*). (See also Arnisaeus, *De republica*, the whole of § 2, where, after citing numbers of theologians, jurists, philosophers, and historians, he gives reasons for preferring Monarchy.) Aristotle also (*Politics*), has a neat disquisition on the various forms of Republics and the political causes of revolutions; so, too, Polybius (*History*, bk. 6). I do not propose to discuss this topic at any length, but merely to consider the laws and institutes of nations in those Republics where the various functions of Sovereignty—

touching such matters as laws, war, peace, treaties, truces, religion, embassies, taxes, etc.—are in the hands of a large aggregate of persons, just as in a Kingdom or a Principality they are in the hands of a single King or Prince.

Whatever, then, a King or Prince may, by the Law of Nations, do in his 3 Kingdom or Principality, the same may be done in a Republic by the aggregate mentioned. Now, suppose it happens that in a Kingdom or Principality the Sovereign person joins another to himself as a colleague in the management of public affairs, does this alter the essential character of the Monarchy? I think not, unless it be quite clear that the Sovereign really means to share all regalities with him on an equal footing. And so neither the additional Cæsars in the old Roman Empire, nor the Kings of the Romans who are at the present time appointed during the Emperor's life, cause any alteration in the internal character of the State. We are, now, however, concerned with 4 Republics; of these there are many varieties; for the supreme power is in the hands either of a Senate or of the people; and so, by the Law of Nations, all public business, sacred and profane, is regulated by either Senate or people. That was the ground taken up by the Romans long ago against the Samnites, to justify them in setting aside the peace made at Caudium; they asserted, that is, that this peace did not bind because entered into without the authorization of the people, in whom the Sovereign power resided at that time.

All this is subject to an exception where the ruling body gives its consent 5 to acts done on its behalf by others, whether that consent be given expressly or tacitly. Where the consent is expressly given, there is, of course, less difficulty in insisting that by the Law of Nations the transaction is as binding as if it had been entered into on the command of the Senate or people. For what difference does it make whether the ruling body consents to the public agreements made for a treaty, a truce, and such like, or makes these agreements in its own person?

A more real difficulty exists where the consent is tacit—not, indeed, whether it is binding (for that is sure enough), but what facts disclose its existence so that by the Law of Nations it may be taken to have been given. Now, there are two indications of a tacit consent in public affairs; namely, 6 the observance of the bargain and lapse of long time. For there can be no doubt about a Senate's or people's consent to a bargain when it has for a long time shown its approval of it by observing all its provisions. The force of this is intensified when we reflect how little difference it makes to the effective validity of an obligation whether the people shows its assent by a vote or by its conduct and in the facts (Julian, in *Dig.* 1, 3, 32).

To throw more light on the nature of Republican institutions, it will be 7 useful to go a little more deeply into their beginnings. It is, then, probable that this form of government was later than Kingship, and took its rise in the spontaneous agreement of men who were accustomed to natural liberty and who found that this was much diminished under kingly rule, especially where

the King ruled badly, and who decided that supreme power ought not to be entrusted to a single individual. Other nations, who were at the time under Kings or Princes, followed their example, employing, as occasion offered, diverse methods—fighting, payment, grant—to obtain their liberty.

8 Europeans, more than others, have been led by their zeal for liberty to cherish Republican institutions—such as, in olden days, the Greeks and Romans, and our German forefathers; and at the present time the Venetians, Dutch, Swiss, Genoese and others—but to discuss the origin of each of these Republics would take me too far away from the aim of this treatise.

9 I think, however, that the following distinction is a sound one, namely, that those Republics which have wrested their liberty by force from Kings or Princes, need after the event the completion of their title by an abdication of royal power on the part of the King or Prince; while those which either were, like Venice, never under a King, or obtained their liberty by a royal grant, like the Lombard States by the Peace of Constance, are at once sufficiently well founded under the Law of Nations. There is no weight in the objection that by the Law of Nations empire may be won by arms and war; it is enough for me in reply to state the rule that subjects are not allowed to use these means against their King or Prince, whereas a forcibly expelled King or Prince is not prohibited by the Law of Nations from seeking to recover possession of his Kingdom or Principality by arms. And so the Tarquins in olden days attempted, although with ill success, to do this against the Romans; and in our own day the King of Great Britain has been more successful, and fortune has crowned his deserts by restoring to him his Kingdom. The principle is the same as would apply to a Kingdom or Principality if a Republic were turned into a Monarchy. Julius Cæsar may have been able to dominate at Rome after his victory at Pharsalia, but this was matter of fact and not of Law; it, however, became matter of Law and irrevocable when the people consented to his domination. Why? Because the people by its consent transferred to the Prince the right and power which was in itself. By parity and conversely, a King who has been driven from his Kingdom by force and arms, and has lost possession of his sovereignty, has not thereby lost his right, or at any rate not irrevocably, unless he has in the meanwhile given his assent thereto; but he loses it conclusively at the moment when he consents to a transfer of it to the Estates or to his rebel subjects, and then it must be recognized that the Kingdom has been made into a State which has been founded in accordance with the Law of Nations.

12 From this it follows (1) That it is the more prudent course to give stability by means of agreements to an empire that has been won by arms. The Swiss Cantons gave an example of this, as appears from the Imperial Instrument of Peace with Sweden, art. 6, and with France, § 61. In the same way the Dutch, too, after a long-continued quasi-possession of full liberty, which they had obtained in the preceding century, elected to affirm their status with the additional force of a pact in the time of King Philip IV of Spain.

It follows (2) That there is, according to the Law of Nations, a difference between a free Republic and a Republic which is in quasi-possession of liberty. For, from what is admitted in the public discussion of nations about pacifications and treaties and such-like business, we can correctly say of a Republic that it enjoys the possession or quasi-possession of liberty, and yet that it is not at once free by the Law of Nations; for it may be that it has asserted its liberty as against its King or Prince without just cause, and it can not, without his consent and an abdication, on his part, of his former dominion, attain the legal position of complete independence, as said above.

And what, it is asked, if the new Republic has made a peace with its King or Prince? Is it still liable to be subsequently reduced to subjection by force of arms? I think it will depend on whether there has or has not been an express undertaking given by the King or Prince that he will not seek to recover his throne by arms. If he has, he must, of course, abide by his undertaking, for there is no doubt that a Prince is bound by a contract which he makes even with his subjects; and that is how the dispute would have to be settled by arbiters. If, however, no undertaking of that kind has been given, the position in many instances seems tenable that, by the establishment of peace between the King or Prince and his rebel subjects who have obtained possession of liberty, there has been a tacit surrender by the former of the right to seek to recover his power by war. For inasmuch as, on our supposition, the prime cause of the war was the shaking-off of the King's or Prince's rule, this does seem to have been surrendered by the peace, having regard to the point (to be made later on) that the cessation of hostilities is the chief result of a peace, whereas there would always be a cause of a fresh war at hand if the King or Prince were to retain entire the right to attempt to recover his position by arms.

All the same, I think it more probable that the right of King or Prince is not surrendered merely by the arrangement of a peace, and that the new Republic of this kind has not from that moment a secure status to rely on. For the cause of the hostilities is deemed to be removed by a peace when this peace is made between Kings or Princes and really free Republics, and not when the King is making terms with rebel subjects who, even after the making of peace, are continuously doing him an injury in refusing him obedience. There arises from every fresh refusal a new cause of war, especially where the rebel Estates or subjects would not suffer the dispute about the government to be settled on lawful principles by mediators or arbiters.

Indeed, in this way the right which remains to the King after the peace would be illusory, if he had no power to assert it against his refractory subjects. Moreover, in the opinion of the doctors whatever is reserved in token of sovereign power passes to others by way of abdication on a King's part only if it has been expressly conceded or if there has been usage to that effect time out of mind. A text in c. 26, X. 5, 40 shows this; and on this canon Panormitanus and others write in the same sense. So who can think that the whole

of sovereignty is lost, not by an express grant of the King's, but by a tacit intention which is to be read into a treaty of peace?

17 It is further asked whether a pacification into which an expelled King enters with his subjects does not at any rate furnish a ground whereon a prescriptive title to liberty may in time be based. That it should, seems sound to me, unless in the arrangement of the peace the King has reserved his rights in all contingencies, because that pacification, though it does not secure them in a right of sovereignty, at any rate secures them the possession or quasi-possession thereof and purges it of the taint of violence, as Paulus says in his own way (*Dig.* 43, 24, 20, 2); and this is especially the case when, on various mean occasions, the Estates or subjects in question have in their conduct put themselves forward as a free Republic, without any contradiction by the King. In that case it is possible to infer a tacit intent of the King not to attempt to regain his power, in such a way that in time a prescriptive right to liberty may mature.

18 The exact amount of time needed for this prescription is not determined by the Law of Nations. I can only repeat what I said above about prescription of kingly sovereignty; namely, that it is completed by such a number of acts as enable us to be morally certain of the King's intent to surrender and concede his right and power. This can not wisely be settled by reference to any precise period of time alone, but also by other indications and inferences of consent to the surrender. And what if the King makes an attempt to regain his position during the running of this prescriptive period? The Republic's quasi-possession of liberty will be interrupted.

19 Suppose the King breaks the fundamental laws of the Kingdom or makes himself by his misconduct unworthy to rule. In this case I think there is no need of any prescriptive acquisition of liberty by the people who have removed him from his position, because such a King as this loses, by the Law of Nations, not only the possession of, but also the right to, his regalities, and no consent of his is wanted if the subjects or citizens wish thereafter to live in the form of a Republic. And yet even here, to avoid stumbling, we must presuppose on his part an open contravention of the fundamental laws or such a flagrant commission of atrocious iniquity that by reason of it the King does not deserve, under the settled Law of the Kingdom, to be treated as King, but as a private person.

20 So far about the formation of a Republic out of a Principality or Kingdom. A few words about the legal conditions of its preservation. Here it is clear that a Republic may employ the right of arms in order to defend itself against violence from outside. But whether, and how far, it may lawfully take measures of precaution against its own citizens, is a bigger question. This is especially so where the given citizen is not actively contriving any hostile act, but is only a cause of apprehension because of his power; in this case it seems right and proper to reduce his wealth to such moderate proportions that it can not break out to the ruin of the commonwealth. This would

be accordant with the principle of eminent domain, in virtue of which the property of private individuals is taken away to promote the interests of the State. Moreover, as each and every private citizen is bound to face even death for the welfare of the State, how much more justly may wealth which is so excessive as to be a danger to freedom be forfeited to the State so far as it constitutes a menace to the State's safety! But if even this solution is 21 unsatisfactory, it will be proper to remove a powerful citizen of this kind from the list of citizens, even though he has done no wrong—a kind of honorable exile which was practised long ago at Athens under the name of Ostracism. Had such a remedy been in use in Italy also, it would perhaps have been impossible for Julius Cæsar to set up a Monarchy at Rome, and for Lorenzo Medici at Florence and Francisco Sforza at Milan to create and establish their supremacy.

This is, indeed, not a remedy which should be promiscuously employed 22 against powerful citizens, but only with a statesmanlike moderation as regards, for instance, time and place, such as approves itself to the wise citizens who have been put at the helm of the State. So far as this is a political matter, it is outside the scope of our question, which relates to the measures which it is lawful and right for a Republic to employ towards its citizens in the exercise and preservation of its dominion.

There is, however, a special case to consider, namely, what course to 23 adopt when the State is divided into two factions, patricians or nobles on one side and plebeians on the other, and on what principle a controversy between the two in a matter of public business is to be decided. Roman history tells us what serious discord there was in days of old in that Republic between the Senate and the populace, what rioting, what secessions of the plebeians from the patricians. Now, the question hinges in general on the form of the Republic, according as it is of the popular or of the aristocratic type. In the former, the people's power is the greater. And so, when the State is split into factions, the optimates can not be reckoned except as individual citizens; and as they will be numerically inferior, the decision will of course be with the plebeians. And when the form of the Republic is aristocratic, the contrary will hold good.

If, however, we imagine a mixed Republic—where, on the one hand, 24 the rest of the people can not determine anything without the advice and assent of the optimates, and, on the other hand, the latter can do nothing without the plebeians—it is clear that, save by amicable arrangement, there is no means of settlement while the form of the Republic remains the same. So it would be necessary either to arrange the matter amicably (and that is the best course) or to leave it undecided, or forcibly to compel one party to give way to the other. The last-named course involves a change in the character of the Republic; it was exemplified in the Roman Republic when the Senate, as they generally did, gave way to the demands of the plebeians.

So much on the topic of this chapter.

CHAPTER XI.

On the Fundamental Laws of States.

SUMMARY.

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| <p>1. Fundamental Laws: what they are, and how they differ from ordinary laws.</p> <p>2. For the preservation of the State a fundamental law may arise <i>ex post facto</i>.</p> <p>3. What is the proximate efficient cause of fundamental laws.</p> <p>4. A law which is made without conventional consent, however necessary for the State, is not strictly a fundamental law.</p> <p>5, 6. A King can not, of the plenitude of his power, destroy the fundamental laws of the realm.</p> <p>7. Fundamental laws not subversive of sovereignty.</p> <p>8, 9. A consideration of Grotius' distinction between a restriction of the exercise of a right and a restriction of the right itself, in public affairs.</p> | <p>10, 11. Clause annulling acts which are contrary to Law, its effect in public matters.</p> <p>12-17. Whether, and how far, necessity justifies a violation of fundamental Law.</p> <p>18. Whether a release from the oath is necessary when, in a case of necessity, the Law has been disregarded.</p> <p>19, 20. A case of necessity expressly included in the rule is not an exception to it.</p> <p>21-24. Whether, and how far, fundamental laws may be disregarded in the public interest.</p> <p>25, 26. The King or his successor may revoke a law made by his mere discretion, any clause to the contrary notwithstanding.</p> <p>27. The same holds good in a polyarchy.</p> <p>28-34. The degree of permissible resistance to a King or Prince who destroys fundamental laws.</p> |
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I Our next topic is the Fundamental Laws of States, whereon the structure of the State rests as on a base or fulcrum. And the first point is, to distinguish between fundamental and ordinary laws. For although the aim of every law should be the welfare of the State, yet the safety and form of the State do not depend on every positive law. And as in architecture every part of a building is connected with its perfection and beauty, yet only the beams whereby the superposed structure is kept together are its supports, so it is with the laws of a State. We are, then, to discuss in this chapter such of them as are fundamental. Now, the fundamental laws are just those agreements whereby the State has drawn together into the form of a governed unit (*imperium*). (See Pufendorf, *De jure naturæ et gentium*, bk. 7, ch. 3, § 1, at end.)

2 I think that this must not be taken to refer rigidly to the commencement of the State: if thereafter, to apply to the circumstances of the time, a law is made for the preservation of the State, which otherwise would be in sore peril, it can be properly called a fundamental law. The fundamental laws of our Empire are of that kind, such as The Golden Bull, The Constitutions of Secular and Religious Peace, The Instrument of German Peace, The Imperial Constitutions, all of which were issued and promulgated, not at the beginning

of the Romano-German State, but afterwards, although the addition of new fundamental laws generally works a considerable amount of change in the status of the commonwealth.

This shows (1) That the immediate and proximate efficient cause of 3 fundamental laws is the consent of governors and governed; for these make a sort of compact with one another about the mode and manner in which the government is to be carried on. It is not necessary for all the citizens or subjects to contract with the King about this, provided that those whose business it is do it in the name of all, as the very serene Electors in our Empire did in the Imperial Constitutions.

The way which I have been describing is that employed when fundamental laws are put before the ruler as conditions annexed to the offer of the throne; and it does not equally apply to the cases when a King, in the course of his reign, introduces some laws of his own discretion for the preservation of his kingdom or the security of the State. For if the supreme and absolute power be in the hands of a legislator of this kind, he will be able to introduce a law which is in the highest degree necessary for his government without the assent of the obedient Estates and subjects. This law is not, properly speaking, a fundamental law, save in a qualified sense, that is, to the degree in which it is directed towards the preservation of the State; for the mode of law-making by consent and contract is different from this.

It is apparent (2) That it is not within the King's discretion to annul the 5 fundamental laws, that is, those to which he gave his consent through the contract made between him and the Estates. So that if he promised to preserve their privileges, he will certainly be unable to annul them in virtue of his royal power and the plenitude of the same, because that obligation binds by the Law of Nations and no King or Prince can withdraw from it (*Felinus, at fallit quarto*, on c. 28, X. 1, 3; doctors on the Clementine, 2, 11, 2; *Haymo Cravetta, Consilia* 241, n. 20; and expressly *Reinking, De regime seculari et ecclesiastico*, class. 3, ch. 12, nn. 17, 18), especially if entered into with the accompaniment of an oath, as is to-day the custom observed in many kingdoms when binding Kings by the fundamental laws. Hence, if a King vio- 6 lates the fundamental laws of his own kingdom, he is said to slay his own dignity. The Emperors Theodosius and Valentinian well say (*Cod.* 1, 14, 4), "For a Prince to own himself bound by the laws is an utterance befitting the majesty of a ruler"; and conformably to this, these Emperors set a laudable example by declaring that their own authority depends on the authority of the Law.

We see (3) That fundamental laws are not in themselves subversive of 7 the nature of sovereignty; and so the sovereignty in our Empire is at the present day vested in the Emperor, notwithstanding the Capitulations and what Grotius writes in *De jure belli ac pacis*, bk. 1, ch. 3, § 16. Grotius, moreover, in the same place admits that where this is the case—that is, where a Prince or King has given a promise to his subjects or the Estates about the

mode of government—his rule is in some sort restricted, whether the obligation touch only the exercise of the act or fall directly on the capacity for the act. Let us examine for a little while what force there is in this distinction.

8 Where, then, it is ordained in the fundamental laws that it is not lawful and right for a King or Prince to do this or that, the obligation falls on the capacity therefor, and then, as Grotius says in the same place, an act contrary thereto is of itself null, because of the deficiency in the doer's power. An example of this would be if a treaty were contracted by a King, alone, who is by Law incapable of making a treaty without the assent of the Estates; the treaty in these circumstances would, by the Law of Nations, be null and void of any legal obligation. But if by the terms of the agreement the King or Prince only undertook not to make a treaty without the assent of the Estates, the power to make one without that assent is not taken away from the King or Prince, however improper it may be of him to exercise it against their wishes; and a treaty so made will be valid, although for what he has done in breach of his promise the King will be bound to make it good to the State or to the Estates to whom he bound himself not to make the treaty. Let us take another example. In the Imperial Abschied of the year 1654 (*§ dieser unsere*), the Emperor undertakes not to grant *moratoria* to debtors; and yet, if he were to grant one, it would be valid despite the Abschied, for the same reason, namely, that the undertaking in question does not bar the right of granting *moratoria*, but only the exercise of the right.

9 This makes it clear that an obligation which bars a capacity lessens the ruler's right in public matters; while one that bars the exercise only, does not do this to the same extent, although it does so in a qualified manner, that is, to the extent to which the King or Prince is by the agreement unable, without an infringement of what is right, to exercise this or that activity. In this and no other sense I admit Grotius' assertion.

10 It must throughout be noted that if to the King's promise to abstain from an act there is annexed a provision annulling any act which contravenes the promise, the capacity to act is itself thereby affected. For example, if a King undertakes not to make a treaty or not to declare war, etc., yet does so, the act will be null and void, and a treaty or a declaration of war so made in breach of the promise will be ineffective because of the proviso in question, which nullifies the act. Yet some one may insist that the same must also be said even when there is no such express provision; and he will rely on the inference to be drawn from *Cod. 1, 14, 5*, where a simple prohibition has the same legal effect attributed to it as to a clause nullifying acts which contravene the agreement. And, he will add, it is clear from *Cod. 5, 16, 26*, that the Prince's engagement or contract has, as such, all the force of Law, and therefore avails of itself to nullify all acts in breach of it; so, contrary to the aforementioned opinion of Grotius, no special proviso about nullification is needed. The right answer to this is obvious. *Cod. 1, 14, 5* must be taken to apply only to acts which are in their essence and jural character forbidden.

If any such act is nevertheless done, it is of itself invalid. For instance, the Law forbids children under puberty to marry; if, then, a marriage was contracted by such a child, it would be null, and this without any express provision of nullification. So in other like cases. But acts in regard to which the King binds himself in public matters, are not to be taken as essentially prohibited in virtue of his undertaking, any more than what a private person does in breach of a contract not to do it, is at once void, however wrong it may be because of the breach of faith which it involves. The sounder and safer view, then, is to admit the aforementioned distinction. And in fact more than one of the Imperial Capitulations have that kind of provision for nullification annexed to them.

Then the question arises whether, at any rate in cases of extreme necessity, a ruler may not depart from the fundamental laws. From the well-worn maxim, *Salus Reipublicæ suprema lex esto*, "Let the State's welfare be its supreme law," it would seem that he can. When, then, public need demands a certain deviation from the fundamental laws, it is rightly held that the ruler is no longer bound by them; for the proviso *rebus ita stantibus*, "the circumstances remaining as contemplated," ought to be read into all pacts and stipulations (*Dig.* 46, 3, 38, pr.). And a case of emergent necessity is excepted from the rule (*Dig.* 2, 11, 2 (3, onwards); 4, 6, 26, 9). It being against all likelihood that the contracting parties meant to include within the fundamental laws a case where such application would harm the State, a better principle is adopted of interpretation in accordance with the intent of the contracting parties (by inference from *Dig.* 50, 16, 219). The doctors give as 13 an example of this the case where a King is prohibited by the laws of his realm from alienating the property of the royal domain; they say that such alienation is all the same allowed in case of extreme need, even against the wishes of the vassals (Bartolus on *Dig.* 20, 1, 11, 3; Salicet, n. 2 on *Cod.* 41, 8, l. (?) § (?); Ludovicus Gomez, 45, on *Inst.* 4, 6, 7). This would especially be the case if he did this in the public interest of peace (*Notes of Barbosa* (?), vol. 2, cons. 11; vol. 3, at *ad hoc respondeo*; Gabrieli, *De jure quæs. non toll.*, concl. 8, lim. 5).

It is undoubtedly on these principles that the secularization of the 14 ecclesiastical property of the Empire at the Germanic Peace of Osnabrück and Münster can best be upheld, as also the transfer of some of the imperial secular property, in part as regards the ultimate ownership (*dominium directum*), and in part as regards the beneficial ownership (*dominium utile*). There is, however, less doubt about this instance, because of the consent given by the Estates of the Empire. Another apt example is supplied by the Leopoldine Capitulation, art. 10, concerning the treaties of the Empire. It is here provided, as an exception to the rule requiring the universal consent of the Estates to such treaties, that in a case of public safety and expediency the consent of the Emperor and the Electoral College may suffice, although the views of the other Estates on this matter are well known through their dis-

cussions on the above-named art. 10. (Compare Sprenger's *Jurisprudentia publica*, p. 144.) On this point I do well to suspend my private judgment.

15 There are some other noteworthy points in this connection which may be added: (1) In order that the King or Prince may be freed from the observance of the fundamental laws on the ground of the pressing need of the State, the need ought to be clear and quite obvious. Otherwise—a thing not to be spoken!—a bad Prince might make any pretext suffice, and thereby reduce the fundamental laws to a laughing-stock. In this connection the doctors' rule applies, that, when a Prince withdraws from a contract there is no presumption of just cause, nor is the matter to be settled by his mere assertion, but the truth and justice of the case must be ascertained from other quarters. (Felinus, Decio and others on c. 7, X. 1, 2; Decio, consult. 602, n. 14, onwards; Cephalus, consil. 311, n. 77; Menochio, bk. 2, pref. 10, n. 32, onwards, and especially n. 63.) Now, there can be no better evidence of necessity than facts and matters of public notoriety, such as the imminence of a hostile invasion, the pressure of famine, the inroads of pestilence; but if necessity can be shown immediately by proof, the same holds good, for this is also reckoned a clear case.

16 It is requisite (2) That, at any rate in all probability, the departure from the fundamental law will be of service to the State. For, however obvious and notorious the need may be, yet, if it is manifest that the commonweal will not be served by a departure from the fundamental laws, and that the danger will not be thereby averted, the Prince or King may not put a slight upon the fundamental laws on the ground of necessity, although genuinely urged. These two, necessity and public welfare, ought to be conjoined—necessity by way of preëminent cause, public welfare by way of end or aim—in order to justify the King or Prince in proceeding to the last resort of neglecting the fundamental laws. Of this sort was the act of Leonidas and his Spartans at Thermopylæ: they preferred to break the Law and die fighting rather than take to a flight which would not have freed their country from the Persian peril.

17 Let us take another case, and suppose that an enemy on whose word no reliance can be placed is threatening an invasion of the kingdom or principality. The King or Prince, who is under a legal prohibition so to do, can not on the ground of the necessity of the time alienate any part of a Province or valuable property of the Crown in order to obtain peace. The reason is, that though necessity is present, yet the public safety will not be secured by that alienation, and it is on considerations of public safety more than anything else that a course becomes permissible which in itself and in view of the fundamental laws would not be permissible (Doctors on *Dig.* 50, 17, 162; Baldus on *Dig.* 5, 3, at end; Cardinal Tuschus, vol. 5, concl. 2, n. 2, letter U; Amaijs, n. 13 on *Cod.* 10, 27, 1.).

18 When a King disregards the Law under pressure of necessity and—beyond any question—for the preservation of the State, must he obtain a

relaxation of the oath taken by him to observe the fundamental laws? I think not. Just as in time of necessity the Law itself ceases to bind, so also the oath. It is as if the contracting parties may be assumed not to have contemplated this case when they drew up the fundamental laws. An oath-supported promise does not bind in a case which may be assumed not to have been in the contemplation of the parties (*Dig.* 38, 1, 27; and Abbas Panormitanus, vol. 2, last ch., on *X.* 3, 48, where he puts the case of a bishop who, despite his oath not to alienate, may, if there be imminent necessity, alienate the property of the Cathedral Church without referring the matter to the Pope.) Panormitanus quotes and follows Cephalus (*consil.* 451, n. 286). This rule applies with especial force to the lands of our Empire, where Church property must by law be reserved for the particular case of extreme necessity. (Imperial Abschied of the year 1542, § *aber der Kirchen Kleinoder.*)

It must further be noted (3) That a King or Prince may neglect a fundamental law on the score of necessity only if the case of necessity be not individually and expressly included within the provisions of the law. The reason for this is that a case of necessity is excepted from the ordinary rule on the presumption that such would have been the wish of those who framed or agreed to the law. Now, there can be no such presumption when there is in the law an express provision dealing with the case of necessity. So the King or Prince can not then depart from a fundamental law on the plea of necessity.

An apt illustration of this is afforded by the Electoral consent which is necessary for summoning the Reichstag; for there is an express provision disallowing the Emperor, even in case of necessity, from omitting to obtain this consent (*Capitulation of the most Glorious Emperor Ferdinand III*, art. 13, at *in zugelassenen, nothdürftigen, ohnverzuglichen und ohnvermeidlichen Fällen*; and the *Capitulation of our Ever-victorious Emperor*, art. 17). There is reason in this, as I have shown in the College of Public Law: because business which can not brook the delay necessary for obtaining the Electoral consent can much less brook the delay of summoning the Diet; and so no exception to the ordinary rule can be based on necessity or on the danger of delay. This holds good in other cases of necessity which are expressly mentioned in the Law and put under the general rule.

It is asked whether, in a case of public utility, there is a similar exception to the strict observance of the fundamental Law. Hardly so, I think, unless where the public utility is evident or where a greater loss to the State may be feared from observance of the rule. For instance, if a King were prohibited by Law from alienating any part of his kingdom, but an opportunity arises of acquiring thereby by treaty an increase of territory to be permanently incorporated in the realm, he will certainly be able to neglect the law thus limiting his kingly power and to alienate (say) a smaller province in order to acquire a greater one for himself and the realm. The intent of these fundamental laws is only to prevent the King from diminishing the property

of the kingdom at all, and he who acquires more than he transfers does not of course effect any real diminution (by inference from *Inst.* 1, 21, pr.; and *Dig.* 5, 3, 25, 11, at *plane*). Similarly, in his own way, Socinus junior, vol. 3, consult. 60, n. 53; and, following him, Haymo Cravetta, consil. 894, n. 2, where they speak of the particular case of a feudal grant whereby the grantor's lordship was increased by new vassals). We may much more employ the same reasoning where there is an increase by new and larger property in return for a smaller grant, so that the latter is in the circumstances lawful as bringing gain to the realm.

23 It would of course be different if this augmentation of the property of the realm led (say) to a greater risk of war; for in those circumstances it would be right to insist on the rule forbidding the alienation of crown property, seeing that this case would be doubtful as regards the utility to the public. It is quite right to draw some distinction between cases of public necessity and cases of public utility. The latter, of course, includes the former from the standpoint of the loss which is averted; yet, on the other hand, there is not a necessity in every case of public utility. These are things, as in our last illustration, which make for the public profit without there being any danger threatened.

24 Of course what was said about necessity applies also to public utility; namely, that undoubtedly, if there is an express prohibition of the alienation of the property of a realm even on grounds of public utility, then the rulers can not justify an alienation on this ground, however palpable it may be.

A third exception may well be added to the two already given; namely, that a King or Prince may infringe a fundamental law to his own prejudice, in the parts of that law which are directed to his own peculiar advantage, but not to the prejudice of the Estates of the realm or principality. This is reasonable, because, according to the general rule, any one can surrender his own right and interest; how much more, then, may a King or Prince do so, always provided it be not shown from other circumstances that he was duped or tricked into doing so.

25 Another question: What about a law which is in a modified sense fundamental, which an absolute King or Prince has laid down of his own plenary power and without any consent of the Estates or subject people? The answer given is that such a law, no matter how it may be fenced about with elaborate provisions—such as one for confirming it by an oath, or for never revoking it, and the like—can always be altered or abrogated by the King or Prince, if he demonstrates his changed purpose by enacting a law to the contrary. I approve of this, because such a King or Prince is still vested with absolute legislative power, seeing that by the Law of Nations he does not lose his sovereignty save by transferring it to another, or by sponson or agreement (as above), or (as below) under the law of conquest in war. Then, again, a mere constitution of the kind under consideration, though supported by provisions of the kind named, does not of itself and without

any agreement to that effect, give the Estates or subjects any right of legislation, or take away or restrict the legislative prerogative of the King or Prince. As, therefore, in virtue of his absolute power, he could make the law in question, he could, in virtue of the same power, unmake it again. This is an illustration of the principle laid down by the doctors, that a Prince 26 can not lay down for his own conduct a rule from which he may not depart. (So said Alexander, of Imola, vol. 6, consil. 3; vol. 4, at *volvit*; Paolo di Castro, consil. 102, last col.; Cravetta, consil. 126, nn. 4, 5.) And this is true not only of the Prince himself, but also of his successor, as Pope Innocent III declared in c. 20, X. 1, 6 (Panormitanus, Imola, and Baldus thereon). The special law arising from a contract, accordingly, binds a Prince more stringently than a law which is merely positive, and which is introduced in virtue of the King's absolute power, although the latter may be about high and difficult affairs of State. It is, then, a wise precaution, if the magnates wish to bind the successor to the throne to observe the positive law of his predecessor, to do it by the special pacts under which the succession to the throne comes to him. In elective kingdoms this is easier than in kingdoms where the crown goes by succession; for in the latter the royal right devolves in the condition in which predecessors in the throne had it, and therefore a new King can not be bound by pacts of this kind against his will; that is, by conditions the breach of which destroys his right to the throne.

As already said, this prevails also in a Polyarchy, to wit, that a law made 27 on the mere authority of Senate or People, they being the repository of sovereignty, can be abrogated by a contrary intent on their part expressed in legislation, even though the highest interests of State are affected. Thus the Roman people altered by the *Lex regia*, which was the foundation-stone of the later Empire, an old law which forbade the erection of a monarchy. So, also, a few years ago the general Estates of confederated Belgium repealed the Perpetual Edict. For the times and circumstances of States, whether monarchic or republican, are subject to change; and so the public laws which relate to the exercise of sovereign power frequently change too. We ought, however, to distinguish clearly according as, in such a case, that power is transferred to another or remains with the former wielders of it. Because, in the former case, if the transferee accepts the offer of the legal position thus rightfully made to him, a pact is present in the circumstances of the case—if not an express one, then at any rate a tacit one—which prevents a subsequent change of the law in question. That is why the Roman people could not make any change in the *Lex regia* of Imperial times; certainly, not by such a bare expression of intent as sufficed to divest them of sovereignty and to invest the Prince with it. In the latter of the two cases just mentioned, the legal position, as already shown, is different.

We now reach the question, Whether, and to what extent, resistance to a 28 King or Prince is permissible when he is subverting the fundamental laws. There is much to be said on either side of this question; it has its peculiar

difficulties. If we simply give a negative answer, then what safeguard can good Estates or the people devise against bad Kings or Princes in order to ensure that the fundamental laws remain really unimpaired? If we give an unqualified affirmative answer, how will good Kings and Princes be secure against rebel Estates or subjects, who will ever be attacking the royal Majesty for some alleged violation of the laws and be scheming revolutions?

29 These are difficulties of fact rather than of Law, because, on the one hand, good Kings and Princes do not break the laws which determine their own status, and, on the other, good Estates do not worry their Kings and Princes with false allegations of the kind named. The question, therefore, is more of a political one; namely, to what extent a constitution has been so skilfully adjusted that, on the one hand, a King who, under the guise of a good sovereign, is a breaker of Law, can not prejudicially affect the privileges of the subjects, and, on the other hand, these latter can not with any ease refuse obedience to the King on any such false pretext as has just been mentioned. But in this place we are leaving that kind of science to students of Politics and are concerned with the Law of Nations, asking whether, assuming a King to be subverting the fundamental laws, the Estates or subjects of the realm may then refuse him obedience and betake themselves to arms in their defense against him.

30 Now, to mark off the certain from the uncertain, I have no doubt when we are speaking of fundamental laws of a qualified character, to wit, those issuing from the mere power of the King, without any pact. This will be so, if only because a King of the kind named can, as said before, repeal at his discretion that class of law; and as he is but exercising his right in so doing, he does no one a legal wrong, and above all no such wrong as excuses the
 31 subjects in rebellion. If, however, it happen that fundamental laws more strictly so called—that is, those which rest on a pact or contract made by the King with the Estates or people—be violated, this is a more serious question. Briefly, my opinion is that if there be a provision for this contingency in the laws of the realm, it must be followed when the case arises; but if no special provision exist, and the answer must be given by the Law of Nations alone, then the question admits of an affirmative answer, provided the following requisites concur: (1) Notoriety of the breach of the fundamental laws, (2) Great importance to the Estates or people of the violated provisions, (3) The hopelessness of any amendment of the King's conduct, (4) Issue of a declaration that the kingdom has been forfeited. These requisites were all present, long ago, when Wenceslaus was deposed; and in the last century the Estates of Holland gave expression to almost the same in the decree of forfeiture which they published against King Philip II of Spain (Van Meteren, *History of the Netherlands*, bk. 10).

The first of these points is, I think, necessary by the Law of Nations; for if a private person may not be deprived of his right when the facts are
 32 doubtful, much less may a King. Hence the Cromwellians have no lawful

defense, for they deprived Charles Stuart, King of Great Britain, of his throne and put him to death on a false charge of crime and breach of Law, or at any rate on a charge that was not evident and proven.

Further, some notable interest of the Estates or people must be served by this act, as where their religion or liberty or privileges are being in fact violated by the King in breach of the laws of the realm. For fundamental laws generally include several heads of different degrees of importance; and assuredly in so grave a matter it will be well to aim at the highest interest (as I have styled it), lest, in order to redress a breach of some head of (perhaps) less importance, resort be had to the extremest remedy of destroying a King's rule, a thing which often arouses great upheavals of mankind.

Next, improvement must be despised of; for if it is not allowable to 33 make war where a voluntary satisfaction may be hoped for, how much less proper is it for the Estates or subjects of a realm to break from their allegiance to their King or Prince before they have tried, and tried in vain, to bring about a compromise of any degree and to remove the cause of the trouble.

Lastly, it is a better and certainly a safer, opinion that requires the publication of a decree to the effect that by breach of the fundamental laws the throne has been forfeited. For, where a private citizen commits a crime, there still must be, as a fixed rule, at least a sentence declaring this (*Dig.* 49, 14, 29, and *Bartolus* thereon; and c. 20, bk. 5, tit. 2, in vi, and the doctors thereon); and in olden times the magistrates of Rome did not abdicate their power before pleading their defense. If this be so, how much more cogently does Right Reason dictate that the same should be observed in the case of Kings who are charged with such a breach of the fundamental laws. 34

When, then, it comes to this, that the sovereign's right has been abjured for good cause and in due form by the people or by the Estates on behalf of the people, with whom the matter rests, the King must in future be treated as a private person, and the homage done aforetime by the subjects will cease to bind them, seeing that, by his violation of the terms on which the throne was offered to him he has broken faith with them and has no legal claim on the promised obedience as being a fulfilment on their part of these same terms.

This, then, briefly, on the subject of the present chapter.

CHAPTER XII.

Of Magistrates, and of Rewards and Punishments.

SUMMARY.

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| <p>1, 2. The need for laws and magistrates in a State.
 3-5, 8-10. The qualities of a good magistrate and judge.
 6. Whether, by the Law of Nations, women are eligible for the magistracy.
 7. The Voluntary and the Contentious jurisdiction of the magistracy.
 11. The civil and the military functions of the magistracy, and their union in the same person.
 12, 13. Whether the Princes of the Empire are merely magistrates.
 14. The Princes of the Empire owe allegiance to the Emperor and are bound to him by an oath.
 15, 16. Every magistrate, properly so called, owes allegiance to some superior.
 17-19. Some magistrates are of higher, some of lower, rank.
 20. Magistrates should be chosen for their personal worth before their good birth.
 21. Magistracies should not be sold.
 22. Those persons not to be appointed to magistracies, who push themselves forward.
 23, 24. A summons to serve one's country in a public office should be obeyed; when not.
 25. Whether persons who devote themselves to study ought to aspire to public honors and posts; and whether they ought to be admitted.
 26. Magistracies to be entrusted to those who are ripe for them in point of years.</p> | <p>27, 28. Magistrates should be ready to hearken to suppliants for aid.
 29. By the Law of Nations, suits not to be entertained in the interest of friends.
 30. Whether the acts of a bogus magistrate, or one whose appointment was not in due form, are valid.
 31-33. Justice of the <i>Leges Juliae</i> about bribery.
 34-40. The termination of a magistracy.
 41. Rewards for merit are given in a geometric proportion.
 42. The wise and generous act of Scipio Africanus at the taking of Nova Carthago.
 43. Generosity of officers to soldiers commendable.
 44, 45. What things are given as rewards.
 46. Penalties may sometimes be remitted by way of reward.
 47, 48. Rewards rightly given to men of the robe as well as to men of the sword; what kind.
 49-61. Whether penalties should be inflicted according to the rules of commutative or of distributive justice; different cases considered.
 62. In case of doubt, the interpretation of a penal law should incline to leniency.
 63. Whether a magistrate may inflict a less penalty than the law names.
 64. Discretionary penalties, as a rule, do not extend to the death penalty. What of a simultaneous conviction of several offenses?</p> |
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I Not only are governments based on the fundamental laws just spoken of, but they also need other serviceable laws for the administration of justice; and herein is exacted not only a wise shaping of these laws, and their promulgation, but also and above all a most sacred observance of the same. Creon, accordingly, laid it down that a State which enforced with unswerving consistency even inferior laws was in a sounder condition than one which was provided with good laws but neglected them (*Thucydides, History*, bk. 3). This being so, there must be magistrates to take charge of sound laws; for it is not enough to enact laws without there being any one to look after them. So says

Pope John XXII (*Extravagantes communes*, bk. 2, tit. 1, ch. 1). Now it is self-evident, having regard to the infinity of the affairs in question, that sovereigns can not adequately discharge this function by themselves. We are told in the Bible (*Exodus*, ch. 18) that Moses found this out. His example, and the very prudent advice given by his father-in-law, Jethro, have, we find, been imitated up to now by Kings and Princes the wide world over. They reserve to themselves the more important and difficult public business, and entrust to others the other functions of justice in particular.

Further, in the chapter of *Exodus* mentioned, the virtues which become 3 a magistrate are set out, to the number of three, Justice, Piety, and Truth. To these there is added in the same place the Hatred of Covetousness—not that it is a separate virtue (for the just man hates covetousness), but to show the importance in the public interest of not entrusting the administration of justice to covetous bad men who contemn the fear of God and the pursuit of justice and truth, and would on every opportunity put them up for sale.

Over and above these virtues, there is indubitably required Knowledge 4 of the Law that has to be dispensed; for without this, a magistrate or judge is in reality driven to approve or disapprove everything like *κωφὸν πρόσωπον*, “a dumb mask,” under the tutelage of assessors. In this respect, even the Roman practice with regard to magistracies barely escapes a merited censure; for, as often as not, men of no legal attainments were appointed to the prætorship, and so in cases of doubt it was the custom for them to take the advice of jurists.

Again, there is a rule about the office of a magistrate in *Dig.* 1, 18, 19 5 which is well-expressed and worth noting: “A judge should not be too easy-going, nor over-reserved; not too severe and difficult of approach; not ready to yield to a suppliant’s tears; but a really good man, and in all contingencies impossible to divert from the path of virtue.” Details as to his origin and family, his honorable birth, and such like, belong to Positive Law and not to the Law of Nations; and, to speak truth, no convincing reason can be given under the Law of Nations why persons of illegitimate birth should be absolutely barred from the higher dignities and honors and offices so long as they are of good intelligence and character.

In this connection, another question may arise, Whether, by the Law of 6 Nations, women ought to be admitted to magistracies or administrative posts. My opinion is, that they should not be; for women are naturally shifty, and fickle in judgment, and so are properly kept out of public business and office. This is the civil law, and it accords with the usage of nations, so that the burden of proof is on any one who alleges the contrary.

The office of the magistracy is a very wide-reaching one; it is primarily 7 divisible into the Voluntary* and the Contentious jurisdiction (*Ulpian*, in *Dig.* 2, 1, 1). The magistrate, that is, may be called on to deal with matters which arise between amicable parties and with those which are brought into court because the parties are quarrelling with one another about them. In

the same way, if a decree of aliment be asked for, or a petition for *bonorum possessio* be brought, or if pupils or others need a tutor or curator, or if the amount of aliment has to be determined, or joinder of offspring to be confirmed, or an inventory to be drawn up, or if a gift or a will has to be registered, etc., the magistrate is called on to play his part; and in cases of aliment he has to act with very great despatch, lest the party entitled die of hunger in the meantime. So, also, in matters of the Contentious jurisdiction, such as the formal commencement of a lawsuit, the examination of witnesses, the reception of documents, the decision of a case, etc., the judicial authority has his duty to perform. So much, briefly, about Justice.

- 8 Next, on what principle do we say that a magistrate should be Pious? Because there is greater risk of his being seduced and corrupted if he be without the fear of God; and so Jehoshaphat, King of Judah (*2 Chronicles*, ch. 19), commands his judges first of all to fear the Lord.

The love of Truth is also necessary, because deceitful men are liable to give other decisions than the sacrosanct rules of Law require.

Hatred of Avarice is of itself not included in the virtues enumerated as essential to the office of a magistrate, because a man who is genuinely just and pious and truthful can not be avaricious. At the same time, to make a special rule against avarice in a magistrate emphasizes the incompatibility of a zeal for justice and the raking together of money by all means, fair or foul, because avaricious persons pay little heed to the way in which they get their money. They are, then, rightly reckoned unfit for judicial posts.

- 9 The Apostle's description of avarice as a form of idolatry is in point here, and is by itself sufficient justification of the exclusion of avaricious persons from the public duties of the magistracy. Much less, then, should those persons who cultivate atheism be admitted to that office; for there is no piety in them, and they have banished all fear of God. Even those who have erected a plurality of gods have, despite their error, a better claim, like the pagans of old, or like those who do the same to-day (though it is rare) in the infidel parts of the world; for it is better to err as to the plurality of gods and control one's passions than to have no fear of God at all and give the rein to desire and put justice up for sale.

- 10 In addition to these good qualities, there is undoubtedly required in a magistrate political Wisdom and industry in affairs, to enable him properly to discharge his functions in the exacting business of the State. These functions are of two kinds, those of the toga and those of the mantle and sword, according as the duty of the magistrate relates to peaceful times and the exercise of jurisdiction between citizens or to the direction of the military forces of the State. At Rome, in olden days, the latter function was the consuls', while the administration of justice was within the regular jurisdiction of the *prætors*; so Pomponius tells us (*Dig.* 1, 2, 2).

- 11 Sometimes, of course, one and the same person has both functions; a province may be entrusted to him with the charge alike of military governance

and of civil jurisdiction. An example of this is furnished by the Dukes of former times; they had the control of the military force and presided over the justice of the State. This is clear from *Cod.* 1, 46, 4; and 7, 62, 38. And this is further evidenced in the rules of Feudal Law (*Consuetudines Feudorum*, bk. 2, 10), where a Duke is described as one invested with a duchy, a Marquis one invested with march-land, a Count one invested with a county. Now, of these, at least the Dukes and Marquises, before these offices became hereditary, discharged in all probability both judicial and military functions, just as the Prefects of the King do to-day in Spain and other countries.

The question is sometimes put, whether the German Princes are to be classed as magistrates. Arnisæus (*De statu imperii Germanici*, ch. 6, § 5, n. 124) takes the negative view, because these positions of regal dignity are now hereditary in Germany. (See also Borcholten, *De regalibus* (?), n. 37, at end.) We find, however, that in more than one place in Imperial Abschiede the Estates of the Empire are ranked among magistrates. The Imperial Abschied of the year 1654 is in this respect like many others; in § *wann sich auch* the German word *Obrigkeit* undoubtedly refers to the Estates of the Empire, being employed to distinguish them from other judges. The passage runs, “*So soll gegen der schuldhaften Obrigkeit so wohl als deren geordneten Unterrichter Bestrafung fürgenommen werden.*” Now unless good grounds can be assigned for rejecting the opinion of Arnisæus, we must say with him that *Obrigkeit* is to be distinguished from “magistracy” in the proper sense of the latter word, according to which it simply means a public office entrusted by a superior power, although in a wide sense all are to be termed magistrates who have been entrusted, whether by the universal Empire or by the Emperor or the Princes and other magnates of the Empire or by nobles or by cities directly or indirectly subject to the Empire, with the exercise in the ordinary course of jurisdiction of any part of public power, according to Paurmeister, *De jurisdictione Imperii Romano-Germanici*, bk. 1, ch. 26, n. 2. Hence, when it is denied that the Princes of the Empire are magistrates in the aforementioned stricter signification, it is by no means denied that they owe fealty to the Emperor or that they recognize his suzerainty, but it is merely asserted that they are not officials patently dependent on the will and pleasure of a superior in the discharge of the duties of their public position. All this, relating as it does to the Public Law of Germany, I add by way of an excursus; for the special position of our Princes, though not repugnant to the Law of Nations, certainly does not take its rise therein, but in Positive Law and in feudal usage.

This, in short, calls for remark, that every magistrate, whatever his power, has some superior, although there may be authorities to which, though going of their own right beyond the position of magistrates, the name magistracy is sometimes applied. We see the truth of this proposition in the case of the Roman Dictators. These functionaries held the highest magistracy

known to ancient Rome; yet they were subordinate to the people, just as, under the Empire, the Praetorian Prefects were to the Emperor.

- 16 Yet the special prerogative of these magistrates did not involve their independence. Thus, it was anciently not right to appeal from a dictator; yet, when a capital charge was brought against the son of Fabius the Elder for having fought (and successfully) with the Samnites contrary to the orders of the Dictator Papirius, and Papirius was inexorable, Fabius appealed to the people in the following striking speech:

" Since neither the authority of the Senate has any weight with you; nor my age, which you are preparing to render childless; nor the noble birth and the merits of a master of the horse, whom you yourself nominated; nor prayers, which have often softened even a foe, and which appease the wrath of the gods: I call on the tribunes of the people for support, and appeal to the people. And since you repel the judgment of your own army, as well as of the Senate, I summon you before a judge who, and who alone, possesses more power and authority than yourself, dictator though you be." (Livy, bk. 8.)

- 17 Now, some magistrates are superior and some inferior. This is not only recommended in the passage from *Exodus* cited a little while ago, but it also is reasonable; for there are different kinds of public business, and different kinds of men who are charged with them; and one man is found fit for the more serious business, and another for the lighter. We have a good instance of this in the Consul Lucius Minutius, whom the Dictator Quintius Cincinnatus delivered when besieged by the Aequi and then addressed as follows: "Lucius Minutius, until you begin to have a soul that befits a consul, it shall be as legate that you command these legions." The consul did not blaze out at this order of the dictator, but obeyed it. Here we have the readiness of the men of olden time to behave discreetly and to submit to superiors! and a consul of great eminence displayed it then, while to-day men of the lowliest station would hardly do so.

- 18 Another example is furnished by Titus Otacilius. After his appointment as consul, no one withheld him more than did Quintus Fabius Maximus, though related to him by marriage. Fabius feared that his election to the consulship would bring ruin alike to the Republic (it was during the stress of the second Punic war) and to the consul designate. In Fabius' noble speech to the Roman people there is the following passage: "Otacilius is married to my niece; but after the favor which you have conferred on me and my forebears, I can not put private relationship before the public welfare." And a little further on he continues:

- 19 " Of you, Titus Otacilius, we had some experience in a less critical business; and you certainly gave us no proof that we ought to entrust a more important one to you. The fleet which you commanded this year, we fitted out for three objects: to lay waste the coast of Africa, to protect the shores of Italy, but above all to prevent the conveyance of reinforcements with pay and provisions from Carthage to Hannibal. Now, if Titus Otacilius has carried

out, I will not say all, but any one of these services to the State, make him consul. But if, while the fleet was in your command, supplies of any and every kind were conveyed safe and untouched to Hannibal, even as though he had no enemy on the sea; if the coast of Italy has this year been more infested than the coast of Africa: what can you have to urge why you should be picked out before all others to be the antagonist of Hannibal? Were you made consul, we should be driven to call for the appointment of a dictator such as our ancestors appointed, and it would not be for you to be offended that some one in the Roman State was thought your superior in war. It really concerns you, Titus Otacilius, more than any one else that there should not be laid on your shoulders a burden which would bring you to the ground," etc.

Would that this were the usage of our own time, too! The affairs of 20 our State would perhaps be better ordered both at home and abroad. There certainly is no more pestilent thing in public life than to pay more regard to birth and kinship than to personal worth. For what have men in general to hope for as regards the orderly attainment of promotion, if they see the way blocked to their merits, not by any fault of theirs, but by their less splendid line of ancestry? If, as the *Lex Julia* testifies, men of old were so apprehensive about improper canvassing, lest any one should creep into the magistracy by corrupt means, how desirable it is for us, and by what precautions ought we to secure, that no unfit person is put into similar posts by the powers that be!

Therefore the Law of Nations can not approve of the usage in some 21 States whereby public offices are put up for sale; for it would be small wonder if the offices so bought were sold by the buyers in their turn, that is, were corruptly administered. We have a notable instance hereof in Pope Alexander VI: he obtained the Papal chair by crooked means; namely, by corrupt purchase of votes of the Cardinals, as Guicciardini testifies (*History*, bk. 1). He, in his turn, made money by the sale of holy things and of ecclesiastical preferment; and hence came the versified invective (though the verse is bad) which Dresser (*Millem. Sext.*) quotes from Pontanus:

Vendit Alexander sacramenta, altaria, Christum;
Emerat ille prius, vendere jure potest.

(Alexander sells sacraments, altars, Christ. He has a right to do so—for he bought them first.)

Surely those persons who push themselves forward and are led by 22 ambition to obtrude, so to say, on the authorities of the State, should not be indiscriminately accepted. It would indeed be a sounder course to appoint persons to magistracies against their will, as we read in Lampridius that the Emperor Alexander Severus did (*Life of Alexander Severus*, fol. 211). This is not meant to suggest that those to whom public offices and magistracies are offered should contumaciously refuse them to the last; for we are not born for ourselves alone, but, as Plato rightly expressed it in *Letter 9, To Architas of Tarentum*, our country claims a share in our begetting, our parents another share, our friends another.

23 When, then, your country itself calls you to the government of the State, it would be impious not to obey the call; your refusal would leave the way open for unworthy men, as Besold, quoting Plutarch, writes (*Synopsis doctrinæ politicae*, bk. 2, ch. 3, § 10). That was why Cincinnatus undertook the dictatorship, and Æmilius Paulus the consulship, and other persons other posts, much against their will; for they sought them not and would rather have been quit of public cares.

24 And this will continue to be the case as long as there is a hope that the State will find profit in the counsels and labors and merits of its worthiest citizens. But the blame must not be imputed to them if, when the State is rotten and beyond hope of cure, they decline office, like Pomponius Atticus (in Cornelius Nepos) and Labeo, who refused the consulship offered to him by Augustus. And we have here, also, the case of Aruntius (in Tacitus), which happened when Tiberius was Emperor. Aruntius declared that he had rather live in an obscure place than, as Senator, be exposed at Rome to reckless accusations. Indeed, what deprived Germanicus himself of his fortune and life but the machinations of his uncle and adoptive father, carried on under the cloak of his consulship and military prefecture of Asia?

25 For the rest, I do not deny that men given up to contemplative study ought to be ready to renounce their idea of finding happiness in the life of ease and to seek it in the common good of all, according to what Aristotle wrote (*Politics*, bk. 7, 2 and 3), and Cicero also (*De oratore* 3); namely, that the duties of life are not imposed for the sole advantage of individuals then living, but for the advantage of all mankind, or at any rate for that of the nation to which the individual belongs by birth, although no one but a fool would say that such persons as these, even if their ability were abundantly clear, ought to be given the control of affairs on the ground of their character.

26 Further, because, as already said, persons fit for the post ought to be charged with magistracies, it is the best course not to entrust duties of that kind unseasonably to persons of unripe age, especially because those of tender years are more exposed to the passions from which a magistrate ought to be free, according to Callistratus (*Dig.* 1, 18, 19). This is, however, a point to be settled differently for different types of men; for some attain soon, and others late, that ripeness and soundness of judgment which justifies for the administration of affairs. Scipio Africanus was made ædile before the usual age, and by his twenty-fourth year had already led a successful expedition into Spain against the enemy.

27 One very important requisite in a magistrate is that he be not difficult of access so that the subject population shrink from the attempt. There is a striking passage in *Novels*, 30, 9, where Justinian is laying down rules for the Proconsul of Cappadocia as to the way in which he should comport himself in his public administration. "He will bestow," says Justinian, "his closest attention and constant care on the performance of his judicial duties, and herein will not allow the oppression of the country-folk by wrong-doers."

This is indeed a golden saying, and one which should be written, so to say, on the hearts of magistrates, in order to prevent what happens so often to-day, namely, that complainants who ask the aid of public justice have to go without it. We read among the rules of Roman Law that to this end a matter ought not to be entrusted to private individuals which can be publicly carried through by the magistrates. And another rule forbids the use of compulsive force in 28 the city, because any one can appeal to the public authorities and approach some repository of public power, who will of course have forbidden the employment of violence against the applicant (*Dig.* 4, 2, 23, pr.). And as this is conformable not only to Positive Law but also, and especially, to Natural Reason and the usage of nations, it is abundantly clear that magistrates who act otherwise go counter to the Law of Nations.

Lastly, included in the requirement that magistrates should be good men, 29 is the requirement that they should not be biased in favor of either party before them; for by the Law of Nations we do not entertain causes in the interests of a friend. "Receive thou this sword," say the Emperor Trajan to his praetorian prefect. "Use it for me as long as you see that I act uprightly, but turn it against me when I do otherwise." It was a saying worthy of his reputation. So also was that given in *Cod.* 1, 14, 4, where the Roman Emperor admits that the laws bind him. And what finer thing does Justinus tell us of Lycurgus, the lawgiver of Sparta, than that he lured and drew the people into law-abiding habits not more by the wisdom of his laws than by the innocence of his life.

Other maxims about the magistracy, such as that the office should not be held too long, that it should not be entrusted to a provincial, and the like belong rather to political science.

The question is sometimes raised in the Civil Law whether a magistrate's acts are valid when there was a flaw in his appointment. The doctors rightly hold, on the authority of *Dig.* 1, 14, 3, that they are valid, provided that the Prince or the people who appointed him knew of the flaw; this point is taken in *Dig.* 1, 14, 3, as in *Dig.* 42, 1, 57. It would be otherwise if there had been a forgery of the document of appointment (*Cod.* 12, 49, 7).

The provisions in the *Lex Julia repetundarum* forbidding the offer of 31 bribes to a public officer are very just. They forbid a magistrate to take anything for the discharge of his duty, and enact severe penalties against offenders. Yet it is generally taken that a magistrate may accept small gifts of eatables and drinkables (*Dig.* 1, 16, 6, 3). By the Law of Nations this should be in moderation only; and it is material whether such offerings are usual, and what their size is. Suppose a gift of a large amount of corn or many wagon- 32 loads of wine was made to a magistrate as such; what could be more just than to make him disgorge them, given forsooth as mere eatables and drinkables, and to indict him for extortion, or (as it is called) *barrataria*? Assume, on 33 the other hand, that gifts of this kind of thing were moderate in amount; it clearly will not do to condemn the recipient as guilty, for the presumption of

corruption has little or no force here. So it seems that this is a matter for a wise discretion to weigh according to the circumstances of each case. Meanwhile, the finer rule in case of doubt is for the magistrate to refuse all gifts, those especially which have any the least semblance of corruption about them; so he will avoid seeming to dishonor Sparta, his trust and ward, for base mercenary considerations.

34 Let us now pass to the opposite topic; namely, the ways in which the public office of magistrate is ended under the Law of Nations. (1) One way is by death, the common doomsman of frail mankind. But here we speak only of simple magistrates whose tenure is fixed and limited in time and space, even if it last for life; for in kingdoms or republics where the office has become hereditary, as was formerly the case in Germany, it carries more than the right of a simple magistracy which depends on the will of a superior, as set out a little while ago.

35 (2) The office of magistrate comes to an end by efflux of time, when the superior power has named a time for its continuance either by public enactment or by special rescript or mandate. Either of these ways is enough, because a magistrate is strictly bound to observe in his office the conditions of manner and time subject to which it was entrusted to him (by inference from *Cod. I. 15; Novels, 7; 30; 102*; and the like).

36 (3) The office of magistrate may be brought to an end by the superior who appointed to it. This can happen in two ways. One way is by a letter of revocation without any stigma attaching to the occupant. We see this employed to-day by the King of Spain when he recalls provincial governors; and it is resorted to in other absolute monarchies in which the monarch disposes, at his free pleasure, of the magistracies of the realm. The other way is by deprivation for misconduct, as in limited monarchies where the royal prerogative must be exercised *κατὰ νόμον*, in accordance with Law. On this principle, a public office can not be lawfully taken away from the holder save for cause, after due enquiry; nor can any one be undeservedly deprived of his rights.

37 (4) Another way in which a magistracy ends is by resignation. What holds good in the Private Law of mandate may claim a place in Public Law also; so says Labeo, quoted by Paulus (*Dig. 2, 1, 6*). Reason dictates this, too. The administrator of a public office should not be held to it beyond the time that his faith remains plighted; it will be open, therefore, to give up Sparta after acquiring it. This is subject to the condition that the office was not initially undertaken for some definite period; if such a period were agreed on, the magistrate should stay in office until its expiry. If, too, he resigns at an inopportune time, the party conferring the office may justly claim that he can not be compelled to let a president or magistrate go at that moment; for no agreement that men make ought to be turned to the prejudice of one of them in a case that in reality was not within their contemplation at the outset.

Now, these modes of determining a magistracy are those that may occur 38 during the continuance of a republic or monarchy in its then form. But where the form of government is changed, magistracies also come to an end by the very fact, because they have derived all their public authority from the sovereign. This is what happened in the case of the prefects of Macedonia after the defeat of Perseus. There may, however, be a difference according to circumstances. Thus, the mere captivity of the King would not put an end to existing magistracies; while a hostile occupation of the realm would do so. The former point was illustrated in the captivity of Francis I, King of France. He declared that the administration of his realm was to continue without any assumption that his captivity was equivalent to his death; and so the magistrates of France continued in office despite his captivity, just as, in days of old, the Roman Presidents and magistrates did when Valerian was captured by the Persians.

When, however, it is not the enemy, but a citizen, who is in possession 39 of the State by a kind of usurpation, it may be asked how long the magistrates remain in their former office. My answer is, that they stay until they are removed; aye, and even then what has been pilfered from them by the usurper is not the right to their office, but only the possession thereof, at any rate until the Estates or people have acquiesced in the usurpation. And if the usurper chance to be slain or put down from his usurped position, the sounder view is that those whom he has put into public office fall from their position by the very fact, since they had no right save such as a rightless usurper could give. After the murder of Julius Cæsar, there was a great discussion in the Roman 40 Senate about his acts and deeds; with this subject Cicero deals more than once in his *Philippics*. The decision arrived at was, to rescind his acts and deeds, which of itself shows that even after his death they were taken as valid. That was, indeed, a special case, because the People and Senate, as we learn from the fragments of Livy, had consented to Cæsar's rule, and so it was proper that after his death his acts should be expressly rescinded; they would otherwise have continued in force.

So far about Magistrates.

Let us now deal briefly with Rewards and Punishments. It is easy to 41 see that rewards belong to distributive justice; for when decreed out of public property it is in proportion to the deserts of the individual, or on a geometric scale. It would be absurd, for example, for a general, in the distribution of largess or of any military rewards, to give the same treatment to the bravest soldiers, who had displayed signal valor in battle and stormings, as to the mass of soldiers who had behaved ill, or at any rate not exceptionally well. Livy supplies a striking illustration of this (*History*, bk. 26). In his cam- 42 paign in Spain, Scipio Africanus carried Nova Carthago by storm; and afterwards he addressed to his troops a high encomium on their valor, because that neither the sally of the enemy, nor the height of the walls, nor the unexplored fords of the lake, nor the fort standing on a high hill, nor the citadel, though

most strongly fortified, had deterred them from surmounting and breaking through everything. And then he declared that, though all credit was due to them all, yet that the man who first mounted the wall ought to have the distinguishing glory of a mural crown. Thereupon a contest for this honor arose between Quintus Trebellius, a centurion of the fourth legion, and Sextus Digitius, a marine; and in the end Scipio, on the suggestion of Lælius, made the following award: "That he had satisfied himself that Quintus Trebellius and Sextus Digitius had mounted the wall at the same time, and that he presented them both with mural crowns in consideration of their valor." (Livy, bk. 26.)

43 See in what high esteem men of olden time held valor in war, that the general preferred, in a case of doubt, to give a mural crown to each of two, of whom only one had earned it, rather than offend his troops by giving to neither or by refusing it to one! Where to-day are such generals? Where such incitements to valor by reward? I willingly admit that virtue is its own reward and that among human goods no greater can be found than virtue; but not every one shares this view. Certainly the majority of mankind need to be urged and stimulated from without for the profit of the State, and ought not to be left to the innate splendor and glory of a virtue, they being ordinarily obtuse to its beauty and dignity.

44 Again, the rewards distributed to military men are of various kinds, sometimes money, sometimes estates and other things. There is an example of such grant of estates in *Dig. 21, 2, 11, pr.* In Livy (*History*, bk. 23), we find Mago demanding, after various victories over the Romans, that the Carthaginians should send pay and victuals to the soldiers who had deserved so well of their country; this may, however, be called paying a debt, not giving
45 a reward. In Tacitus (*History*, bk. 4), the legate, in a forceful speech, upbraids the soldiers who were then defecting to the Germans, seeing that they had taken largess either from Vitellius or from Vespasian, then certainly Roman Emperor.

Such things as have been named are the common rewards given to many at a time; more gratitude is shown when an individual is picked out for a special gift. Such special gifts may consist not only in tangible things, but in privileges and honors and dignities. The Greeks gave the victors in the Olympic games a wreath of olive leaves as a prize; this surprised Tigranes the Persian, so Herodotus tells us (*Urania*). And kindred to this are the prizes given by our own Germans in those spear-games called Tourneys. So, too, a Hungarian who has slain a Turkish foe wears some feathers in his cap, a badge of honor which seems to us almost ridiculous, but which is a signal distinction among them.

46 Sometimes, too, the remission of a penalty takes the place of a reward. Thus, after his third victory Horatius had his life spared, although he had killed his sister: he had appealed from the King's sentence to the people; and they, because of the service he had just rendered, would not allow him to be

put to death (*Livy, History*, bk. 1). But the sad cases of Counts Egmont and Horn in the Low Countries, under the Duke of Alva, and of the Seigneur Biron under Henry IV of France, all of whom were executed, show that it is little good to hope for pardon of offenses because of meritorious conduct.

Men of the robe who win distinction are as much entitled to rewards as 47 men of the mantle and sword. This is shown by the case of Cicero, on whom the Roman people conferred the title Father of his Country, for putting down Catiline's conspiracy. And when such honors as privilege of nobility, doctors' degrees, and the like, are at the present day bestowed on those who have done good work, in civil life, the principle of distributive justice is in operation; and so it ought to be, especially in connection with public offices, of which I spoke a little while ago.

And in this connection mention should be made of grants of fiefs, jurisdictions, regalities, pensions, and similar advantages, made to distinguished men of the robe, wherewith Kings and Princes at times recognize their merits. And what if the royal treasury can not afford these, or is exhausted by expenses? The right and proper thing for these deserving men then is to bear the delay with patience, thus lightening the burdens of the State. That is a weapon which Necessity seizes on. But it must all the same be borne in mind that even in hard times the public should bestow some care on these cases, at least to the extent of providing subsistence for these worthy men, and that in better times the debt to them must be acquitted.

A harder question about punishments remains; namely, Whether they 49 ought to be inflicted in accordance with the rules of commutative (which Grotius calls *expletrix*) justice or with those of distributive justice. Those who take the former view argue as follows: Penalties which in themselves are of different degrees of severity and are unlike one another may really be the same if we take into account the different qualities of the wrong-doers; and so they should be imposed on the arithmetic rather than on the geometric scale. The premise being true, the conclusion is true also. But this argument presupposes that the penalties which are attached to the same offense, but which vary with the individuality of the offender, admit of being made to fall with precisely the same force, as, for instance, when murder committed by one of the lower class is punished with death, but when committed by one of the upper class, with banishment or deportation to an island (*Dig. 48, 8, 3, 5*). This is not an easy matter, as the sequel will show, although I readily grant that the punishment ought always to be proportionate to the offense, and that by all Law it is wrong to inflict a punishment too heavy for the offense, or too small either, lest public interests suffer through crime going unpunished.

And so my answer to the foregoing question is distinctly this: In private 50 torts it is undoubtedly right and proper to apply the arithmetic scale, for it can not matter whether the damage which is being assessed under the *Lex Aquilia* was committed by a magnate or by an ordinary man. Frantzke

points this out correctly (n. 34 on *Dig.* 1, 1), and it holds both of positive Roman Law and of the Law of Nations. But in crimes, where public justice is involved, the distinction named is a material one according to Roman Law; for in this system different punishments are often attached to the same crime, according as the criminal was of higher or of lower rank. (This is clear from *Dig.* 48, 8, 3, 5; 48, 13, 6, pr.; 47, 10, 45; 48, 19, 28, 16; and *Cod.* 9, 47: 5 and 12.)

51 But here some raise objection to the observance, in the exaction of punishments, of commutative (or *expletrix*) justice (I do not propose to discuss the variety of nomenclature); they challenge, I say, the justice of this, namely, that essentially different punishments ought to be considered as equal when the different qualities of the persons punished are taken into account, on the arithmetic scale. The punishment of public infamy, for instance, falls much more severely on men of honorable rank than on plebeians and men of the baser sort. Thus, when Pope Leo X restored to the wearing of the scarlet Cardinals Bernardino Carvajal and Federigo San Severino, who had been degraded by Julius II, and the penance enjoined on them was that they should beg for pardon bare-footed, this was a severer thing because of the dignity of the Cardinalate than it would have been in the case of any ordinary person.

52 The question, however, is not finally concluded by the fact that, in punishment for public wrongs, the arithmetic scale, and with it *expletrix* or commutative justice, may be applied. The diversity of punishments still remains; and to consider them identical is in the highest degree improper, resting, as this does, on an analogical system of interpretation. Now, the analogical equivalence of different punishments, to wit, that a punishment inflicted on a man of the better class may be taken as exactly commensurate with a severer punishment inflicted on a man of lower class, is itself not free from doubt.

53 Let us take the following by way of illustration: On conviction of homicide or sacrilege, men of the lower class were thrown to the beasts, men of the higher class were deported to an island (Marcian, in *Dig.* 48, 8, 3, 5; Ulpian, in *Dig.* 48, 13, 6, pr.). Now, even allowing for a difference in the persons on whom the two punishments are inflicted, what proportion can there be between being torn to pieces by savage beasts and being deported to an island? In the former punishment, natural life is taken away in a terrible fashion; in the latter, the person under punishment has still the hope of pardon and reinstatement, a hope which is sometimes fulfilled, as in *Cod.* 9, 51, 1. These illustrations are, however, taken from the Civil Law, and come from times when respect of persons at the discretion of the ruler

54 was much more prevalent, to the subversion of discipline and Law; but from the standpoint of the simplicity of the Law of Nations, I agree that punishments ought to be imposed with equality on the arithmetic scale, without any respect of persons. This would afford a better protection to the authority of Law; and it is what was observed among the Romans before the decline in the

bindingness of Usage. The consul Junius Brutus gave a signal illustration of this when he ordered his own sons to be executed along with others who had conspired to bring back the Tarquins (Livy, *History*, bk. 2). The consul Titus Manlius gave another, when he had his own son beheaded for engaging with the enemy in defiance of the consul's orders—and this although he was victorious (Livy, *History*, bk. 8). It is better that men of position should 55 set an example to others by their own innocence than be a stumbling-block through the lighter punishment of their misdeeds; and so Manlius said to his son, "Since the authority of the consuls either is to be established by your death or is to be forever nullified, by your being forgiven, I do not think that even you, if you have any of our blood in you, will hesitate to restore by your punishment the military discipline which has been subverted by your misconduct."

On one point I have little doubt; and that is, that punishments legislatively 56 enacted apply to all citizens, whatever their rank, who break the Law, provided they are subject to the lawmaker's power. Others, not under his power, may be exempt; this was so in old Rome before the *Lex Hortensia*, when patricians were not within the operation of plebiscites. In this class of legislation the words used are general words, and the legislator's intention is taken to be similarly general, namely, to bind all citizens alike to the observance of those penal laws by the threat of the same penalty in every individual case of transgression. But when the Law issues from an arbitrary source, it is a 57 bigger and harder question whether, in the punishment of public offenses, we ought to distinguish according to the kind of offender. I admit that by the Law of Nations we ought not to, for the reasons already assigned; but any one could defend an affirmative answer as regards the Civil Law of Justinian's time, by means of the cases already quoted. In regard to these, some moderns adopt the explanation that the difference in the severity of the punishment, in the absolute sense, which was provided for different classes of persons, did not depend on the offender's office in the State or on his rank, in itself and as a primary cause, but only consequentially, in that an offender of high rank and dignity deserved for his offense (say) the punishment of exile, while an ordinary man deserved whipping or death. But this explanation is 58 not sufficient, because of the difficulty, already mentioned, of precisely measuring these punishments by the same standard, and because the texts quoted show the opposite; namely, that persons of higher rank were, as such and because they were such, visited with lighter punishments.

Where, then, by Positive Law, commutative justice indubitably obtains, 59 it is not enough for it to be dispensed with equivalence as regards diversity of persons. For instance, it is immaterial whether a seller is of high or of low station; for he must perform his side of a contract exactly, and in a contract of (say) sale the Law gives no privilege to a seller of high station, entitling him, in circumstances where one of low station would have to deliver the thing itself precisely, to discharge the obligation by some equivalent performance.

And if there are cases in which the Law allows equivalent performance, that is, the rendering of something of equal value, this will be allowed no less to an ordinary person than to a man of rank. Why, then, should we adopt a different principle in regard of public wrongs, with the idea that, if different punishments be awarded to persons of different rank, the alleged *ἰσοδύναμια* (equality of force) will remove all difficulty? From this it follows that, whenever Positive Law varies the punishment to suit the grade of the offender, it is more correct to say that this is done in accordance with the principles of distributive justice. Yet herein there is a departure from the simplicity of the Law of Nations, which subjects all citizens, without distinction, to the equal operation of the penal law.

It follows, secondly, that whenever there is no clear law or custom that different punishments should be inflicted, the same punishments ought to be for the same crime, whatever be the culprits' rank, as long as they are under the power of the legislator and have no exception by any special law in criminal matters, as said above. For so far as there is anything inconsistent herewith in such a thing as the execution of a man of rank convicted of homicide by soldiers under public authority, and not by the headsman's axe, this is rather to be taken as the granting of a boon than as the demand of a right; we saw a famous example of this a few years ago in this very State.

61 It follows, thirdly, that in the conferment of rewards and honors the same principle applies as in punishments; for no sufficient reason of a different kind can be given why, in the distribution of honors, the person of a more distinguished man is considered in and for itself, but, in the infliction of punishments, is considered only accidentally or consequentially. For just as those who unconditionally construct in the Roman penal law a commutative justice enunciate a diversity corresponding to that in the delinquent individuals, such that a lighter punishment visited on a man of higher rank is equated to a heavier punishment visited on a man of lower rank, so we might say, in connection with rewards, that the adequate reward which a worthier person receives before a less worthy, must, from the standpoint of the worthier person, be deemed less than adequate, but from the standpoint of the less worthy and humbler person, greater; yet we do not for that reason hold that commutative justice operates here, and therefore that same principle can not rule in penal matters.

62 Further, it is quite certain that, in these penal matters, those who administer justice should follow, in doubt, the more lenient course. This agrees with Positive Law (*Dig.* 48, 19, 42, and the doctors thereon) and also with the Law of Nations. There are undoubtedly some kinds of punishments in use, the main object of which is to reform rather than to give unnecessary pain; and so, when a magistrate is in doubt about the intention of a penal statute, he should, with propriety, choose the milder.

63 But the question is asked, Whether a less than the statutory punishment can be inflicted. I think not, unless the Law of the State has sanctioned the

remission, although at times the Roman Law allows a kindly modification (*Dig.* 48, 19, 11). The judge or magistrate will, then, tread the track of the Law to the nicety of a word, inflicting neither a severer nor a lighter punishment than the Law names, except where that kindly modification is approved by Law or usage; as, for example, when one who should be burnt alive is ordered to be decapitated first and then burnt, or where one who should be broken on the wheel is first decapitated and then his corpse is placed on the wheel.

In discretionary punishments, the death-penalty should not be resorted to, save where there is great reason therefor and the Law expressly sanctions it; this is on the same principle as that on which we recommended the choice of leniency. Where, however, many crimes have been committed by the same person, the punishment of each and all, where they can be suffered together, should be exacted; in default, that one which is more severe; for it is absurd that a criminal should earn immunity from punishment by committing more crimes. With this topic I have dealt, following other writers, in my *Praxis judiciaria* (part 2, last ch.).

Let this suffice on the present subject.

CHAPTER XIII.

On the Commerce and Contracts of Nations.

SUMMARY.

1. The origin and necessity of commerce.
2. Commerce properly so called: what it is.
3. Three kinds of commerce forbidden.
4. Agreements to pay interest repugnant to the Divine Moral Law.
5. Usury forbidden by the Canon Law, but allowed under the name of interest.
6. 8. Divine Law, Canon Law, and the tradition of commentators differ concerning usury.
7. By the Civil Law, usury at one time allowed within certain limits; and not utterly repugnant to Divine Law or to the Law of Nature.
9. The opinion of canonists, prohibiting all forms of usury, previously received in many places.
10. Usury, unless excessive, not repugnant to the Law of Nations; and why.
11. For the *interesse* of the canonists, which depends on the same equity as moderate usury, there are three requisites.
12. No difference between "interest" of the kind *lucrum cessans* and usury *lucratoria*, by the Law of Nature and of Nations.
13. *Interesse* and usury in the Empire of to-day limited to five per cent.
14. Moratory interest is due by the Law of Nations without agreement.
15. Annual rents allowed by Canon Law; considered to be in nature of principal.
16. The requisites of unlawful usury according to the canonists.
17. Whether in loan usurious interest runs from the time of the agreement.
- 18-20. The trade of harlots unlawful by the Law of Nations.
21. The trade of eunuchs, how far repugnant to Natural Reason.
22. Trade with the enemy in arms and provisions unlawful.
23. Trade with the enemy in wine, oil, and other liquids prohibited by Positive Law but not by the Law of Nations.
- 24-26. Trade with the enemy which is not to the detriment of the State is permitted, but at the risk of those who engage in it, the commodities being capturable in war, unless otherwise arranged.
27. Commercial engagements and contracts entered into in peace not on that ground secure in time of war.
28. Constitution of Pope Alexander III (c. 2, X. 1, 34) is Positive Law only.
29. A commercial agreement entered into in time of war for the mutual security of the parties binds even during the war.
30. What commerce forbidden by Positive Law.
31. Privileges excluding others from certain kinds of commerce permissible in the interests of the State.
32. The sovereign can impose such restraints as he pleases on freedom of trade.
- 33, 34. Trading activities underlie many public works.
35. Monopolies forbidden both by Positive Law and Law of Nations.
36. Grant of regular markets belongs to the sovereign.
37. Commerce is either by land or by sea.
38. Hanseatic League founded long ago in interests of commerce; some famous commercial associations flourish at present time in Holland.
39. Mercantile suits to be adjudged on equitable principles, and quickly.
- 40-42. Whether, and to what extent, questions between merchants to be settled by reference to the Law of the place of contract or by their own customs.
- 43, 44. Whether, and for what purposes, Kings and other authorities may take trade-profits for themselves or their treasury.
- 45-47. Whether, and to what extent, commerce may be restricted or forbidden by the civil power.
- 48, 49. The nature of contract in general, and how it differs from commerce.
- 50, 51. The varieties of contract under the Law of Nations enumerated.
52. Contracts of the Law of Nations regard either the State or individuals.
- 53-57. Agreement not followed by delivery does not pass the property by the Law of Nations.
- 58-61, 63. Contracts governed by the Law of the place of celebration, except the contracts of Kings and Princes, and except where there is a consul there belonging to the nation of the parties.
62. Contracts made where no definite legal system prevails are governed by the Law of Nations.
- 64-66. What if a contract expressly provides that questions of performance and discharge shall be governed by the Law of some other place, where there are definite positive laws on that kind of business?

There is no doubt that Commerce originates in the Law of Nations i properly so called. For it is a common saying, Not every land produces everything. But different countries lack different things; this one has no salt, that one no corn, the other no wine or spices. And so, for the satisfaction of the needs of human life and for the promotion of the supply of commodities, a mode had to be found whereby people could share their goods with one another, and their mutual want of this or that article be of service to different countries and districts. Accordingly, commerce must be held permissible not only on the general ground that it is not forbidden, but also because it is so necessary to the preservation of mankind that, speaking absolutely, it can not be forbidden. (Sigismund Scaccias, *De commerciis*, qu. 1, § 1, n. 47 at *quod est necessarium*.)

This shows that Commerce in the proper sense, in which it is used here, 2 is nothing else than the sharing of goods brought about by mutual bargaining. Fabianus de Monte S. Sabini (*De emptione et venditione*, qu. 4, n. 1, at end) calls it the exchange of wares; but a general meaning must be given here to the words "exchange" and "wares"; otherwise the description is hardly exhaustive enough for the amplitude of commerce (by inference from Paulus, in *Dig.* 18, 1, 1 (pr. and 1)). Our German word is *Gewerb* or *Handelschaft*.

An exception must be made of three kinds of commerce which are held 3 forbidden by Law: (1) Those which are repugnant to the Divine Moral Law, or are contrary to natural honesty and current morality; (2) Those which are against public policy; (3) Those which are specially forbidden by law, etc.

As an example of the first kind, we may take usurious contracts; they 4 are forbidden alike under the Old and the New Dispensation (*Exodus*, ch. 22, v. 25; *Leviticus*, ch. 25, v. 36; *Deuteronomy*, ch. 23, v. 19; *Psalms* 15, v. 5; *St. Luke*, ch. 9, v. 34). This led the canonists totally to prohibit usury, so that any addition to the principal debt was reckoned unlawful usury (c. 1, and c. 3, and the whole of, C. 14, qu. 3; the whole of 5, 5, in VI, and of 5, 5, in *Clementinis*).

A refined distinction is, however, drawn by glossators, to the effect that 5 what is forbidden is usury as usury, but not as interest (*interesse*). (See gloss on c. 8, X. 5, 19.) The canonists have commonly adopted this view (Panormitanus, n. 6, on c. 8, X. 5, 19; Innocent, c. 1, n. 2, on X. 5, 19; Barbosa, n. 6, on c. 8, X. 5, 19, with others there quoted). The gloss employs the argument that the canons do indeed forbid usury for gain or increase (c. 8 and c. 4, C. 14, qu. 4), but that elsewhere interest (*interesse*) is expressly allowed (see c. 17, X. 2, 2; and c. 2 and the following cc., X. 3, 22). But what these texts show is that it is lawful to take *interesse* into account in a case of *damnum emergens*, but not equally so in a case of *lucrum cessans*, although Panormitanus and Barbosa (places named) insist that it is permitted even in the latter case; and this is undoubtedly the common and received opinion, according to what we find in Covarruvias (*Variæ resolutiones*, bk. 3, ch. 12, nn. 1, 2).

6 And, to say truth, the doctrine of the Canon Law hereon is not the same as that of the Divine Law; nor is the older Canon Law in this respect the same as what the glossators and commentators lay down. For, as to the Divine Law, it undoubtedly is founded here on the duty of loving one's neighbor; and its prohibition of usury is simply from that standpoint. The prohibition is primarily in the forum of conscience, and does not involve that all usury, but only such as is inconsistent with loving one's neighbor, ought to be prohibited in the external forum by Positive Law. We have for instance, the precept about showing mercy (*St. Luke*, ch. 6, v. 36), and others like that about loving one's enemy; yet these ought not to be, and are not, brought within the sanctions of the external Law, as the authors of the Canon Law propose that the rule against usury should be. In the Old Testament and under the old dispensation, it is manifest that usury was allowed against a "stranger" (*Deuteronomy*, ch. 23, v. 20), however much the clear words of that text are twisted by others (see *Covarruvias*, *Varia resolutiones*, bk. 3, ch. 1, n. 7).

7 Hence usury was, within defined limits, allowed not only by the founders of the Civil Law, but also by the Emperors, pagan and Christian alike (*Cod.* 4, 32: 19 and 25 and 26, and the whole title). Had they deemed it utterly repugnant to the Law of Nature, neither the pagan nor the Christian Emperors would have allowed it; at any rate the latter would not have allowed it had they deemed it contrary to the Bible. I am aware that Gail (2, obs. 5, n. 5) is of the opposite opinion and says that usury is forbidden by every kind of Law; but he can not give any absolute and unqualified proof of this except as regards the Canon Law. Petrus Friderus (*De mandatis*, etc., ch. 72, n. 7) defends the other view with considerable learning.

8 The glossators and commentators added (as I said) lucrative interest, that is, interest in lieu of lost profit (*lucrum cessans*) to the genuine doctrine of the canons, for these latter only contained a general prohibition against all profit in excess of the principal debt (see, in this connection, c. 8 and c. 4, C. 14, qu. 5). And such canons as c. 17, X. 2, 2 and c. 2, X. 3, 22 refer to no other "interest" than that of incidental loss (*damnum emergens*). Laws, however, ought not to be founded on words, but on circumstances and consequences (*Dig.* 2, 7, 5; and *Cod.* 6, 43, 2, at end); and if any one were to sue for a large amount of lucrative interest, I think he would go more counter to natural equity, and offend more against the rule of loving one's neighbor, than one who made a small and moderate profit by way of usury, although the canonists hold the former permissible and the latter not.

9 However this may be, their view has ere this prevailed in many kingdoms of the Christian world, which have by positive law forbidden usury even in the external forum. And this is quite right with regard to excessive usury, as in our Empire (see *Reichs-Polizeiordnung* of the years 1548 and 1557, tit. *von wucherlichen Contracten*). That such contracts as these are repugnant to Divine Law and natural equity because of the great dispropor-

tion of the bargain is quite true; but as the same rule is applied throughout, even to moderate usury resting on the agreement of the parties, the reason of the thing, if tested by natural equity, is not found convincing: and those reasons which Covarruvias (place named, ch. 1, n. 5) has gathered together out of Thomas Aquinas and other writers are even weaker, as Charles Dumoulin rightly judges (*De contractibus*, p. 74, n. 528); and to him may be added Petrus Friderus Mindanus (place named).

This makes it clear that under the Law of Nations an agreement is not 10 bad as usurious, except to the amount of any excess. For just as, in all kinds of contract, commercial convenience requires the acceptance of a certain disproportion in the two sides of a bargain, it being almost impossible in foreign trade to subject everything to one rigid standard, so usury may be allowed in commercial dealings, in order to increase the number of those who, in these corrupt times, are willing to lend money. And this is so, even though it means that a creditor receives his money back with an addition in accordance with the agreement, and therefore in accordance with the debtor's intention, especially as the creditor has to do without his property in the meantime, a point taken in the opinion given by the jurists of Frankfort, A. D. 1619 (Richter, *Decisiones* 74, n. 3).

It is on the same equitable foundation that the aforementioned canonic 11 *interesse* rests. For this (according to the gloss on c. 8, X. 5, 19, and the doctors in many places) there are three requisites; namely: (1) The bond of a principal obligation; for interest, being an accessory thing, always presupposes this; (2) Delay in repayment by the debtor; (3) A loss enuring therefrom to the creditor, or a profit diverted away from him through the delay in repayment. In connection with this last, there is the superadded requirement that the creditor was in the habit of trading, and that the opportunity of making the profit had actually arisen (so Paolo di Castro, following the glossators, n. 3, on *Dig.* 13, 4, 2, 8). This doctrine has been commonly adopted by the doctors, and followed, in their consultations, by Riminaldus, Junius (consil. 218, n. 19), Hondedea (Consilia, bk. 1, cons. 50, n. 3, and bk. 2, cons. 39, n. 2); and it has been copiously discussed by Scaccias (tractate named, § 1, qu. 7, and § 2, ampl. 8, n. 99), with many others.

So the "interest" of a missed profit (*lucrum cessans*) differs from 12 (what is called) lucrative usury, principally in this, that there is in it a delay on the debtor's part which embarrasses the creditor, and a compensation for the profit which the creditor failed to make because of his lack of funds consequent thereon.

Now, lucrative usury rests on agreement, and this is forbidden; for the profit which comes from agreement is held to be more at variance with reason and equity than that which springs from the circumstances of the case and from the delay of the other party. Looking at the matter more carefully, however, I think that this is not a difference for which there is a sufficient foundation in the Law of Nature and of Nations, because lucrative usury also

rests on the debtor's delay, and can never be sued for except in regard of the period during which the debtor fails to restore to the creditor his principal-money. But it is absurd to think that a profit based on the debtor's delay, without any agreement, is juster than a profit based on agreement, with supervening delay on the debtor's part. You see, then, that if we try the matter by the principles of the Law of Nature and of Nations, there is no real difference between interest of the missed-profit kind and lucrative usury, albeit the canonists allow the former, and condemn the latter as illicit profit-making.

13 Again, there has been much litigation about the rate at which that *interesse* is to be computed; and so an Imperial Constitution of the year 1600 (§ *so viel nun diesem nach*) put an end to the doubt by declaring five per cent. to be the lawful rate, and this whether it be a case of missed profit or of incidental loss; and this rule is reaffirmed as regards annual rent-charges, as well as loans, by the recent Imperial Abschied of the year 1654 (§ *anreichend*). Accordingly, the right to *interesse* is now presumed by Law up to that amount from the beginning of the debtor's delay, although that constitution does not expressly ordain that interest on a loan is due by the mere fact of the delay without any agreement.

14 I am of opinion that by the Law of Nations an agreement for interest in that event is not requisite. For it is by that Law enough that I have an interest because of your delaying to make repayment of the money owed to me, whereby you have caused me to fail to acquire something I could otherwise have acquired, or to lose something belonging to me, or to incur some loss and damage; and consequently equity, which is the principal consideration in contracts of the Law of Nations, declares that you must make this interest good to me: and for proof that this obtains in the Civil Law and in imperial constitutions, see my *Praxis judicaria* (part 1, ch. 16, nn. 31, 32).

15 What about annual rent-charges *? The Canon Law holds them lawful and not usurious (*Extravagantes communes*, bk. 3, tit. 5, chs. 1, 2), the reason being twofold: (1) That they are redeemable and extinguishable on the creator's demand (texts just cited and *Reformierte Reichs-Polizeiordnung* of 1548 and of 1557, tit. *von wucherlichen Contracten*, § *und nach dem*); and (2) That they are in the nature of capital, and not of an accession, according to Gail 2, obs. 7, n. 6.

16 Hence, for a case of unlawful usury properly so called there are, in the opinion of the canonists, three requisites: (1) An accession to the capital—and for the lack of this requirement an annual rent-charge is not usury; (2) Gain of the purely conventional kind, that is, gain which may be claimed on the contract, without any reference to the circumstances or the debtor's delay—and for the lack of this both punitive and compensatory interest are not

*What is meant may be illustrated as follows. You pay me 1000; in return I charge my lands with an annual payment to you of 40, it being agreed that I can redeem the charge at any time by paying you back the 1000. (It seems necessary to read *creatoribus* for *creditoribus* in the text.)—Tr.

reckoned illicit usury (gloss on c. 8, X. 5, 19). But in this connection I have already shown that under the Law of Nature and of Nations lucrative interest also does not depend on the contract merely—unless we imagine a case in which the borrower may not, by the terms of the contract, pay the capital back when prepared, but is bound to wait for a time before doing so and discharging his debt; for in that case I must admit that, as delay can not be imputed to a debtor who is ready to pay, such an agreement is by itself usurious. (3) A certain quality is required in the contract; namely, that there be a loan underlying it, since it is only in that case that there can be illicit usury properly so called (gloss, as above). Hence the rule was introduced that, in loan, usury or interest does not run from the time of the contract, as it does in annual rent-charges (*Gültverkaufungen*); and it is clear from the Imperial Abschied of the year 1654 (§ *anreichend*) that the rule has not been changed at the present day, as I showed in my disputation on the same (th. 84). Still, by local usage the rule may be different; and the only obstacle to the validity of such local rule is the commentaries, set out above, of the interpreters of Canon Law, no obstacle being raised either by the Law of Nature or of Nations or by the Civil Law (the whole of *Dig.* 22, 1 and *Cod.* 4, 32; *Dig.* 45, 1, 135, pr.).

Again, to the same class of commerce, forbidden as repugnant to the Divine Law and national probity, the trade of harlotry should also be referred. Foul and promiscuous lust of that kind ought not to be considered human, but bestial; and it is accordingly declared reprehensible and illicit by the Law (*Dig.* 12, 5, 4, 3; *Cod.* 4, 7, 5; *Dig.* 7, 8, 7; *Nov.* 14, ch. 1, § 1; *Constitutio Criminalis* of Charles V, art. 122, 123). It is also forbidden in the Bible (*Genesis*, ch. 38, v. 24; *Leviticus*, ch. 21, v. 9; *Acts*, ch. 15, v. 20; and *1 Corinthians*, ch. 6, v. 18).

No obstacle is raised by the case of Judah (*Genesis*, ch. 38), who lay 1 with a woman whom he imagined to be a harlot, bargaining to give her a kid in payment; for that bargain is not approved, but is only mentioned. Certainly the payment of what he had promised, or rather the tender of payment, did not remove the essential wrongness of the act and agreement, as if on this ground the promisor could, as Judah seems to have thought, be freed from guilt and blame. It is indeed a fouler thing still, on the part of the woman, to make her body common; and so even Judah himself decreed that his daughter-in-law Tamar was to be burnt for her harlotry.

Nor is there anything adverse to my view in *Dig.* 5, 3, 27, 1, which says 2 that the rent of stews may be part of an inheritance claimable by action, and that stews exist on the property of many upright men; for the connivance of an upright man in a disgraceful act does not make the act itself good and lawful, and indeed the text in question, as the gloss points out, was corrected by *Nov.* 14.

We are now in a position to deal with the modern usage which tolerates stews anywhere; it does not legalize harlotry, although it allows it in these

degenerate days for fear of a greater evil, as being a less evil, though always illicit in itself. (See Angelus on *Dig.* 5, 3, 27, 1, following the glossators thereon; and Covarruvias, *De sponsalibus*, part 1, ch. 4, n. 10, where he lays this down well, on the authority of dist. 13, ch. 1, and of Aristotle, *Ethics*, bk. 5, ch. 3, and of St. Augustine, *De ordine*, bk. 3.)

21 The trade of eunuchs is, I hold, of the same brand. It is repugnant to Right Reason, being opposed to the prime intent of nature, which aims at the preservation of mankind by every individual and so is balked by this business of castrated men. And it must be observed that the moral turpitude of this business extends to every one engaged in it, not only by buying or selling, but also by making, eunuchs; for this latter act is in itself flat against nature, while dealing in eunuchs is only against nature consequentially, and only bad to the extent that the circumstances of the dealing make it so. For if there were no persons who procured eunuchs for a consideration and sold them, there would, maybe, be more to make them; and so Roman Law prohibited this castration under penalty of death, prohibiting, however, the trade in eunuchs only as regards Romans, and not as regards barbarians who were castrated outside the Empire (*Cod.* 4, 42: 1 and 2).

22 Scaccias (*De commerciis*, § 1, qu. 7, p. 8, lim. 10, n. 2) writes on the second main kind of forbidden commerce. The case he takes is the sale of arms to the enemy. Every citizen is bidden by the Law of Nations to abstain from this trade because of the obvious hurt thereby done to the State, every private citizen being bound to further the interests of the State and to avert mischief from it. From this standpoint the Emperor Marcian forbade every one, under penalty of confiscation of property and death, from carrying or exporting any kind of munition of war to the barbarians (*Cod.* 4, 41, 2). Within the same rule should come corn and the like things whereby belligerent operations may be carried on or facilitated. This is particularly applicable to the theater of a war and to a place from which such goods can easily be taken within the enemy's lines. The Common Law further forbids sale to barbarians of wine and oil and such-like liquids (*Cod.* 4, 41, 1). These, however, are Positive Law only, and not Law of Nations; and the latter can hardly be considered operative to-day, unless the barbarians in question are actually at war with us, for otherwise we find trade allowed without restriction as to the kind of goods. Christian peoples, of course, ought not to reckon each other as barbarians, and it is beyond doubt that trade between them in wine and other liquids is permitted, unless specially forbidden. Prohibitions of this kind were forbidden during war in Holland as regards French wine.

4 But, except such commerce as is detrimental to the State or forbidden by public proclamation, even commerce with the enemy is not prohibited by the Law of Nations, but the subjects of enemy powers may enter into commercial contracts with one another and are bound thereby, always saving the rights of the State and of their fellow-citizens, to whom war gives the right

of capturing enemy property. Let us, then, imagine that wares have been 25 delivered on shipboard by an enemy subject in pursuance of a contract: it will certainly be allowable for privateers (*Seecapers*) to capture them despite the delivery; for the one enemy subject was bound to the other only so far as performance of the terms of the contract goes, and these were satisfied by the delivery, and the property passes to the other party by his acceptance of delivery; and so, it being now enemy property, it is subjected to the risk of capture by the enemy which attaches to all enemy property. We see, then, that even permissible trade with the enemy in time of war is not easily carried on; and this sometimes leads belligerents to agree, in their common interest, to 26 exempt commerce from hostile attack. In the recent war between Sweden and Holland, there was such an agreement. Commerce, in such a case, remains free, and neither side may capture goods of an enemy subject while they are in transit consequent on a commercial dealing. So marked is the effect of the agreement on those kinds of trade which have been specified therein!

Such specification, however, is requisite, and not unreasonably so; for 27 although there are commercial treaties between some nations, these can not be extended to the case of war, so that the contracting parties and goods which have been delivered in the course of trade should enjoy public security even then, unless there has been a special agreement to that effect. For, just as a regular war involves a rupture of peace and of treaties of alliance, so it involves a rupture of treaties about commercial security. Either side, accordingly, may then capture the goods of the other.

It is obvious that the constitution of Pope Alexander III (c. 2, X. 1, 28 34), which ordains that, among others, merchants shall be exempt in war, belongs to Positive Pontifical Law and not to the Law of Nations, seeing that not even Christian powers observe it in time of war, as is manifest.

But I should think that if belligerent powers have, during the war, 29 made an agreement of this kind, whereby each side promises safety for the merchants of the other, that will be enough to render ships and merchants' goods at sea and in transit immune from capture even by a privateer, and this though there was no express statement (such as it would be better to insert) that the agreement was to operate during the war, seeing that it is in reality abundantly clear, from the circumstances of the time when the agreement was made, that each party, in the public interests of the preservation of his trade, meant merchants and such of their property as was embarked in commerce to be as secure as possible during the war. Another cogent reason for this interpretation is that the obligation of a contract should begin when the contract is made, unless the contrary be expressed. And if any war releases the obligation in question, it should be a subsequent war, not the then present war, because it may be presumed that the parties thus making a commercial agreement at a time when they actually had begun to fight each other, had not in contemplation and did not mean to affect their agreements of trade (*mer-*

cantia, as it is called) which they had made in time of peace and quiet; for all these latter are outside the scope of commercial contracts made in time of war.

30 Commerce of the third kind, namely, that which is forbidden by the Positive Law of this or that State, is similarly illicit. Examples hereof furnished by the Civil Law are certain dealings in buildings with a view to breaking them up (*Dig.* 18, 1, 52), and dealings in purple and silk and public-owned corn (*Cod.* 4, 40, 1). It is noteworthy that *Cod.* 4, 40, 2 takes away the silk trade from private persons, for it reserves to the *comes commerciorum* the right to procure silk from the barbarians.

31 So the privileges whereby this or that kind of trade is exclusively granted to a magnate or to a city fall into the class of prohibited monopolies (Scaccias, above named, lim. 10, n. 15; in the following n. 16, he correctly deals with the privileges granted by the sovereign to printers); but in these cases a balance must be struck in the interests of the public, and as it is subject to various burdens it ought in turn to be relieved by this or that advantage (by inference from *Cod.* 7, 37, 4, at *qui enim*; and *Dig.* 50, 17, 10). There is a clear case of this in Roman Law, *Cod.* 4, 61, 11, where, if any one other than one of the salt-farmers presumes to buy or sell salt, the salt must be taken from him and assigned to the salt-farmers. This illustrates what I said, that while the sovereign can not exactly take away from private individuals the freedom of trade which the Law of Nations allows them, yet he may impose certain restraints upon it.

32 Those restraints may take various shapes: thus, they may relate to certain classes of persons, such as clerics, nobles or soldiers, and officials (see the whole of X. 3, 50; *Cod.* 12, 34, 1); or to certain commodities, as in *Cod.* 11, 9, 5; or to certain kinds of contract (*Cod.* 4, 65: 30 and 31 and 35); or to a certain place, as in *Cod.* 4, 63, 4; and other such-like varieties of circumstance.

33 Let us, then, sum up as follows: commerce which is not repugnant to the Divine laws, or to probity, or to public policy, or the constitutions and enactments of sovereigns or other authorities, is permissible. But although the trade is permitted, yet the taxes, tolls, excise, and similar burdens must be paid in respect of the goods; these exactions are often a serious, though indirect, hindrance to trade. Hence, it is not in the interests of the State that new taxes and tolls and such-like privileges should be indiscriminately granted, much less that they should be usurped of a man's own authority; and when, aforetime, during the Thirty Years' War in Germany, such usurpations were a little too numerous within the Empire, the *Imperial Instrument of Peace with Sweden* (art. 9, § *et quia publice*) put them down again in order to bring back the prosperity of trade. And, to that end, in the *Reichs-Kammergericht*, decrees were issued by the Holy Roman Emperor *

* "Mandata S. clāā" in the text puzzles me. In Part I, p. 56, col. 1, l. 6 we have "Cæsarea mandata"; and so I have assumed here that "S." is for "Sancta" and that "clāā" is a misprint for some abbreviation of "Cæsarea".—Tr.

for putting an end to new taxes, not only if they were absolutely new, but also if they were called new in point of excess.

Another thing that must be classed among the burdens on trade is the Staple: this is granted as a privilege to certain places, to the end that travelling merchants may display their goods for sale there; and other things are the safe-conducts, and the customs-duties called *Geleidt und Standtgelt*, whereby and by other like things intercourse which under the Law of Nations is free is subjected to restraint, and that legally. This restraint is also imposed by various kinds of illicit monopolies, which, being adverse to trade, must be deemed prohibited not only by positive law (*Cod. 4, 59*; and *Reformierte Polizeiordnung* of the years 1548 and 1577, tit. *von Monopoliën*), but also by the Law of Nations which does not countenance the carrying-on of this or that trade by one or a few only to the hurt of the community. It is clear that, although the mercantile intercourse referred 35 to owes its origin to the Law of Nations, yet it is by the civil power that grants of regular markets are made, and no private person may set up a market save by the indulgence of the Emperor or King or other public authority (*Dig. 50, 11, 1*).

Now, commerce is carried on either by land or by sea, or other water; 37 and so one kind of commerce is land commerce and another is maritime, to which latter river commerce in its own fashion belongs. And to-day commerce is carried on not only by the ordinary person (as was of old the rule of the Civil Law), but by nobles also and cities, aye, distinguished ones, and even by Princes and Kings, because of its signal utility to the State, or at any rate they bestow much care on it. It was this that in times past drew together 38 the public and renowned league of the Hanse towns; and in Holland there flourish to-day the celebrated associations for maritime trade with the Indies, commonly called the East- and West-India Companies.

Questions which arise between merchants must, undoubtedly, be interpreted and adjudged on principles of fairness and equity (*Bartolus, on Dig. 17, 1, 29, 4; Rota Genuensis, decis. 95, n. 5; and decis. 195, n. 12*). And commercial causes are held to be of the most summary order, requiring the utmost despatch both in sentence and execution; wherefore they do not admit of appeal in our Empire, because of the dangers of delay, or at any rate not so as to involve suspension of execution (*Dig. 49, 5, 7; Imperial Abschied of the year 1654, § als auch bei Handelstätten*).

Another question is, By reference to the Law of what place ought mercantile questions and causes to be settled? The correct answer is, By the Law of the place of the contract, in accordance with the presumed intention of the parties. This presumption is not only consonant with the Civil Law (*Dig. 21, 2, 6; and 22, 1, 1, pr.*), but also with the Law of Nations. It is fair and right under that Law to assume this intent, and also to hold that a dispute between individual litigants should be settled in accordance with the laws of the place where it took its rise, that is to say, the place where the

contract was made; and as regards the parties, they are held, if no other intent be expressed, to have had the then present time of the contract in their contemplation, and also the place, and therefore the laws of the place, where they were (commentators aforesigned, on *Cod. I. I. I.*).

41 This is so unless the contract names another place for performance; for more attention is then paid to this place, as indicated by the end and aim of the contract (*Dig. 44, 7, 21; Rota Genuensis*, decis. 105, n. 3).

42 And suppose that the case in question can not be decided by the Law of the place of the contract? Recourse must then be had to the Law of Nations or else to the received custom of merchants, which in mercantile causes is considered of very great importance (*Rota Romana*, in *Merlino*, decis. 338, n. 2; *Straccha, Tractatus de navigatione (?)*, n. 24). It is in this custom of merchants that we must trace, I think, the origin of those special mercantile judges, called consuls; for the origin of this special mercantile jurisdiction in *Cod. 3, 13, 7*, which the doctors think proved, is quite alien to the sense of the passage. Personally, I would rather trace it to the very ancient Law of Solon that any arrangement between merchants, whereby they arrange for the management of their joint affairs, is to be upheld (*Dig. 47, 22, 4*; and see, concerning these mercantile consuls, *Straccha, De mercatura, rubr. de jud. seu consul. mercat. et quon. in caus. eor. sit proced.*, p. 500 and many following pp.)

43 A further question is, Whether, and to what extent, Kings and other supreme civil authorities may divert the profits of trade to the use of themselves or their treasury. My answer is, To the extent that, and in the cases where, the law of eminent domain allows the conversion of private property to public uses. So, if the safety of the realm be overthrown or danger to the State be threatened by the enemy, and no money is available from other sources for the support of the troops, the King or other civil power can come down on the profits of the large trading associations under their rule and take therefrom as much as suffices for the safety and needs of the State; but in that case equity requires that, as soon as may be afterwards, the merchants and their partners shall be awarded some compensation for their loss.

44 I hold, too, that this requisition is lawful even against the will of the merchants, because property ceases in some sort to be subject to the control and discretion of private individuals when the relief of public necessities is in question; in such a case the King's suzerainty, or eminent domain, prevails. This shows that the King of Spain did not act unjustly when, under the stress of the needs of war, he seized the greater part of the silver brought from the Indies and belonging to the trading flotilla. The same thing holds good in other cases, unless some special agreement is in the way or the Law has expressly taken away from the ruler the power to do this.

45 And what about the right to forbid trade, what are its limits? This must lie wholly in the just discretion of the civil powers, it being theirs to say how far it is for the public good to allow or restrain commerce. It is manifest

that trade can not be totally prohibited; otherwise the principle of the better preservation of human society would be violated: but it can undoubtedly be restricted consistently with that principle, either as regards persons or as regards classes of goods; the examples given a little while ago show this. Thus the Emperor, with the assent of the States, can, for just cause, forbid the import of foreign manufactures (as they are called) so far as this import reacts injuriously on the citizens and subjects of the Empire.

Further, I have no doubt that trade with the whole of some one nation 46 may be forbidden; that is, all citizens of the Empire may be forbidden to carry it on with this or that nation, provided it be seen that more loss than gain would result to the State from that trade, as is admittedly so in the case of conquered enemies. Beyond doubt it would have been better for the Romans not to acquire the wealth of Asia, although won in war, than for their State to be corrupted by Asiatic luxury and so sink into deeper and deeper ruin. If the vices of a conquered State could produce that ill effect, 47 what will not the strength of a sound and commercially prosperous one do for us? This consideration justifies still more the prohibition by public authority of trade which will injure the whole nation.

So far, then, succinctly and briefly, about the very fertile subject of Commerce. Scaccias, Marquard, and others have dealt with it more fully.

Agreements of the Law of Nations remain; this is the second part of 48 this chapter. These agreements differ from commerce as cause differs from effect. This can easily be shown; for the reciprocal sharing in commodities which constitutes commerce, as said above, presupposes as its basis the intent of the parties; and the expression of that intent, so as to create an obligation to transfer or do something, is that *consensus ad idem placitum*, "consent and agreement to the same effect" which Ulpian gives in *Dig. 2, 14, 1, 2* as a definition of *pactio*, a word synonymous in general with *conventio*. Hence, the word *placitum* is by itself sufficiently clear; not every kind of *placitum* is meant, but a *placitum* with regard to doing some business. Herein, from this theoretical con-sensus of expectations, a convention in the general sense is rightly seen to arise. Ulpian asserts that convention is a very far-reaching 49 conception (*Dig. 2, 14, 5*), including, so he says, the public and private varieties, the latter being conventions arising either by Law or under the Law of Nations. And again (*Dig. 2, 14, 7, pr.*), he subdivides conventions of the Law of Nations into those which ground an action, and may therefore be classed as true contracts, and those which only engender a plea in defense, and are not dignified by the name of "contract." And so, if we were minded to write about the conventions of the Law of Nations in all the amplitude of that conception, we should have to deal with the whole area of contracts which originate in the Law of Nations (a thing done by others at considerable length in their treatises on that law).

But let it be enough, at the present, for me to indicate the main classes. 50 Every one, then, who engages in commerce binds himself either to transfer

or to do something (*Dig.* 45, 1, 72). Promises to transfer, and the obligations which arise thence, contemplate as final cause a change of ownership, as in loan, sale, barter, etc. Promises to do relate to the use either of things or services. This may occur either gratuitously, as in mandate, deposit, loan for use, and the like; or for a consideration, as in letting on hire and in the innominate contract for interchange of services.

51 Again, some kinds of promise and obligation are proffered by way of doing a kindness, and come from the law of friendship. In them we give the use of our property or our services gratuitously, as in the cases just named of mandate, deposit, and loan for use; for the mandatary and the depositary give their services, and the lender the use of his property, gratuitously. In the same class as the last-named, tenancy-at-will (*precarium*) must be placed; and in the class of gratuitous services, the quasi-contract arising from the rendering of unasked service (*negotiorum gestio*). Some promises and obligations, on the other hand, are onerous; this is where there is a promise given or a performance due on both sides, as in partnership, pawn, and the like. This classification is on the same lines as the classification into what are called unilateral and bilateral contracts.

52 Now, inasmuch as many things relating to contracts have their source in the Law, I will reserve a fuller discussion of the contracts of the Law of Nations and of private agreements for another place; and I will speak here in particular of the former kinds of contract, the most notable example of which is that in vogue between Kings and States. Now, the conventions which bind men to one another under the Law of Nations are of two kinds; for men are contracting either as nations or communities (as about an alliance, or peace, or a truce, or the rules of neutrality, and so on) or as private individuals. Conventions of the former kind, being made by those who hold public authority (royal or other) or civil power, are called public; those of the latter kind (the chief kinds of which I have just set out), being made by private persons, whether of the same nation or of different nations, are called private: this distinction is drawn, in its own fashion, by a text in *Dig.* 2, 14, 5.

53 Now, an important point in connection with this last-named kind of convention is that, according to the better opinion, it is not enough by itself, under the Law of Nations, to pass ownership; but there must also, for this purpose, be delivery. For, the intent of the owner is otherwise imperfect, if it merely rests on the terms of the convention, at any rate when he has the opportunity of inducing the other party into vacant possession of the thing, according to *Cod.* 4, 49, 8. And so it was the general rule of Roman Law that ownership is not transferred by mere convention without delivery (*Cod.* 2, 3, 20).

54 And for the reason mentioned, the same holds of the Law of Nations, as I showed above at some length, when considering the modes of acquiring ownership under the Law of Nations and when answering, at the same time, the arguments of Grotius to the contrary.

And it is obviously easy to show that this rule, requiring delivery over 55 and above agreement for the transfer of ownership, is even more useful, nay almost necessary, in international commerce. For if mere consent, expressed in a contract, were held to be enough by the Law of Nations, the rule would encourage numberless lawsuits; no one could be sure about his ownership of a thing that had been delivered to him, but would inevitably be always afraid that the transferror had already promised it to some one else who, on the Grotian doctrine that the former contract or agreement had made him owner, would be able to claim the same thing by action.

Accordingly, some of the more celebrated commercial centers, like 56 Lubeck, have thought it so advantageous to commerce that they who take delivery of a thing should be as sure as possible of the ownership thereof, that even where the transferror was not really owner, but only (say) depositary or borrower, the depositor or lender is taken as having only himself to blame for entrusting the thing to him, and, in consequence, can not assert his rightful ownership against a third party who has obtained possession of it in good faith.

I do not now go into the question whether such custom or statute is 57 just or not; all I say is that, so far from the Law of Nations which introduced commerce admitting the doctrine of transfer of ownership by mere agreement, it has rather adopted the opposite doctrine by force of usage, namely, that the interests of commerce are furthered the more the rule prevails that those who are in *bona fide* possession of a thing may be certified of their ownership of it in virtue of its delivery to them; so that, for the sake of conducting business in its own way, it has seemed better rather to extend the rule that delivery confers ownership on a *bona fide* transferee, even where the transferror is not owner, than to limit it to the uncertain and doubtful cases in which the transferror has not previously promised the thing in question to another by contract.

For the rest, we will consider whether, and to what extent, the Law of 58 Nations prevails in private conventions and contracts. Without doubt the parties to a contract, even though they do not belong to the same country or nation, deem themselves subject to the Law of the place where the contract is made (by inference from *Cod. 4, 63, 4*). And so the contracts of private persons are not to be pronounced on by reference to the Law of Nations, but by reference to the Positive Law of the country where each contract was formed (by inference from the comment of the doctors on *Dig. 21, 2, 6*); so, at first sight, it seems superfluous to discuss the question. Yet it is not wholly superfluous, because there may be no law of that place on the subject, and then, in these cases of omission (as I said a little while ago), recourse must be had to the Law of Nations.

In a word, I think the following distinction can be drawn: The contract 59 is made either in a part of the world where some positive legal system prevails or not; in the former case, the rules of that legal system are applied, even

though somewhat discrepant with the Law of Nature. A different rule, however, prevails in the contracts of Kings and Princes, and other supreme authorities, because in their case there is no such presumption as I mentioned; for, although a King, when in another country, does not continue in the effective enjoyment of his power (except, perhaps, over his own men), it still is not probable that the King of another realm, in which we assume a contract between Kings to be entered into, means those laws to apply which apply to private contracts; for such laws only lay down rules for subjects of the realm or other private persons, and not for the regal dignity. And although a King who himself is the law-maker may rightly observe the laws of his own making, at any rate for the probity of the thing and for the sake of example—to which *Cod. 1, 14, 4* also points—yet this principle vanishes in the case of a foreign King, he not being the maker of the laws of another realm; and consequently his contracts, when made within another realm, are in this case to be measured by the Law of Nations.

60 The same applies to Princes of the Empire, as regards the application of local statutes; and so if the statute of any place introduced the rule (say) that suretyship was invalid unless registered with a magistrate or an official body, another Prince who, in that territory, becomes a surety or gives security is not bound by the statute, but this suretyship is valid without registration. It would be different if, in that territory, a private person became surety for a foreign Prince, because what I have said about a Prince or King is essentially personal to them and does not go beyond their persons on any presumed intent of the law-maker; for he must be taken to have intended to bind by his positive laws, not persons of his own degree, but his own subjects.

61 Further, it is also different, in the former of the principal cases now before us, if the one nation has in the other foreign country a mercantile consul, empowered to judge between his fellow-nationals; for then, by parity of reasoning, if these latter contract with one another in that same place, they must certainly be taken to have had in contemplation, not the Law of that place, but their own Law, or in default the Law of Nations. For the nation which is privileged to have a judicial officer of its own in another country, must be further privileged to live under, and be judged by, its own laws, as regards that official.

62 In the latter of our principal cases, we must have recourse to the Law of Nations. Therefore if, for example, a Dutch merchant contracts with a Spaniard in an uninhabited part of the world, or on the sea, or in a desert island, the contract should not be governed by the Law of either Holland or Spain, but by the Law of Nations. And so, if they have chosen to make a written contract, although the formalities of *Cod. 4, 21, 17* be observed on both sides, yet they will not on that occasion be needed, but the contract will be good by the Law of Nations even if not drawn up in due form, read over, and subscribed; and if an action is brought hereon either in Spain or Holland, the Law of Nations should be applied.

There is, however, a different answer to be given in our second principal case if it be two Dutchmen or two Spaniards who are contracting with one another in a pagan country and there is in that place a consul of their own nation, as just mentioned.

But in the following case, namely, where a Spaniard, for example, makes with a Dutchman in the Indies a contract which is to be performed in Spain, I doubt whether the contract ought not to be governed by Spanish Law. This would be in accordance with the doctrine of Paolo di Castro on *Dig.* 13, 4, 2, pr., following the glossators on the same text; but the opinion of Bartolus and Jason, on *Cod.* 1, 1, 1, is to the contrary, they declaring that the place of the contract must be looked to and the laws of that place followed, and not the laws of the place of performance or execution. I think that in this question we ought to consider whether, when the parties indicated in the contract the place of performance, they did so as a term of the contract, going to the substance of the obligation, or as something accidental to it and as a kind of superadded agreement: in the former case I think di Castro's opinion right (by inference from *Dig.* 44, 7, 21; and 44, 7, 21); and in the latter I think the doctrine of Bartolus and Jason ought to prevail. The reason of this distinction is that, when the parties to a contract would not have entered into it at all unless it had provided for performance and fulfilment in some given place, there is more stringency and precision in their intention that this shall be the place of payment than when the place has been so casually mentioned that it is not probable that the parties intended the laws of that place to govern the contract. All the same, in Spain Bartolus' opinion would prevail if there were any doubt, on the ground that when doctors disagree, the Law of the State determines which is to prevail, as is said by Caccialupus (*De modo studendi in utroque jure*), and, following him, Besold, in his dissertation *De libris juris civilis*.

For the reason above stated, I do not add here anything further about the other more special questions concerning loan for consumption, loan for use, pawn, deposit, sale, letting-on-hire, mandate, partnership, exchange, and other contracts of that kind. Any one who desires can see hereon Mozzius and Wading. (*De contr.*), and Pufendorf (*De jure naturæ et gentium*, bk. 5, ch. 2, onwards).

So much for this chapter.

CHAPTER XIV.

Of Legates and Plenipotentiaries.

SUMMARY.

1. About the word "legate."
 2, 3. The source of the sanctity of legates.
 4. The characteristics of a legate are sometimes in doubt.
 5. Four requisites of a true legation.
 6. Sovereigns and those analogous to sovereigns have the right to send legates.
 7. Among the latter, the Princes of the Empire are prominent.
 8. This is also conformable to the Law of Nations.
 9, 10. Kings and Princes have this right of legation, even though bound to some feudal superior.
 11. Viceroy and Governors have not this right in their own person.
 12. Whether a King or Prince who has been conquered or deprived of the possession of his kingdom or principality has the right of legation.
 13, 14. Right of legation requires a commission to discuss and manage public business.
 15, 16. Whether and how far legates can be sent to others than equals.
 17. Ambassadorial privileges claimed for the legates of Princes; also security under the Law of Nations.
 18. Princes who are so in name only, and who are not actually in possession of sovereignty, have no right of legation.
 19. Why legates are sent in time of war to the generals of another country.
 20. The security of legates depends on being allowed admission expressly or tacitly.
 21, 28, 29. Whether all legates, without distinction, must be allowed admission under the Law of Nations.
 22. The obligation to allow admission to legates and the completing of the character of a legate are different questions.
 23, 24. Until the other side grants permission to enter, the person sent is not a true legate but a mandatary of the sender.
 25. Tacit consent is enough for the admission of a legate; how it can be deduced?
 26. Amplification of this point.
 27. A Prince or King ought to receive previous intimation of the despatch of a legation to him.
 30. Definition of a legate.
 31. Classification of legates under the Law of Nations.
 32. Classification of legates of the Roman Curia.
 33. Legates have the privilege of safe-conduct and public security.
 34, 35. In olden days legates carried herbs and staves as emblems; now they carry letters of safe-conduct under public protection.
 36. The security of legates applies to their suite and property.
 37. Legates have no privilege of security as regards third powers.
 38-40. The sanctity of legates disappears if they are guilty of public violence or treason, provided their guilt is notorious or evidently provable.
 41. Not permissible to use violence to a legate in retaliation for similar violence used by the other nation.
 42. During the continuance of the legation, a legate may claim the privilege of being sued in his home forum.
 43-56. Whether, and how far, he has this privilege in delicts, and in contracts, and in successions under a will or on intestacy.
 57, 58. Difference between movables and immovables as regards a legate's privilege of the forum.
 59. How far legates have this privilege as regards debts and real rights.
 60. Whether, in matters of the voluntary jurisdiction, legates apply the Law of the place of their legation or the Law of their domicil.
 61. Legates have privilege of religion.
 62. A legate has jurisdiction over the members of his suite and household, and right of asylum for his house.
 63. The qualities of a good legate.
 64. Two main heads of a legate's duty.
 65. If a legate has two commissions, one express and the other tacit, does he bind the sender by acting according to the express and contrary to the tacit commission?
 66, 67. How far plenipotentiaries bind their Kings and Princes, and whether their acts require ratification.

After I spoke of agreements in general, whether public or private, I reserved the special consideration of the latter class for a more convenient place. In later chapters I shall have to speak in detail of the former. Now, it is a characteristic of these agreements that they are ordinarily entered into and made by intermediaries called legates. So it will be well to prefix here a chapter about legates and plenipotentiaries. The word "legation" comes from "*legare*," but this has a number of various meanings, as may be seen in the dissertation *De lege* (th. 3), of my honored friend Dominus Felbinger. "Legate," for our present purposes, means a person sent by a King or Prince or Republic to discuss public businesses and carry them through; so, in our vernacular, he is styled *Gesandter* ("one who is sent"). It is in a sense due to the necessities of the case that peace and treaties and truces, and such-like businesses, are arranged by mandatories; for the powers themselves, Kings and Peoples, can not fittingly meet together and discuss matters. (Felden's *Notes on Grotius' De jure belli ac pacis*, bk. 2, ch. 18, § 4.)

But I can not deny that public expediency may be alleged as a concomitant cause of the introduction of the Law of Nations regarding legations (see Ziegler on the aforenamed chapter of Grotius, § 3, at *legationes assidue*). Necessity and public expediency, however, are not opposed to one another; but the former is included in the latter, what is publicly necessary being publicly expedient to be done, although at times something publicly expedient yet not of absolute public necessity may be the object of a legation. Examples of this are legations with commercial objects, or for affirming friendship, or for conveying congratulations or condolences on happy or sad occasions. Still, even there, too, necessity is present, if only as regards the fit mode of intercourse; for personal intercourse between the Kings or public powers concerned in these expedient affairs would be impossible, or at any rate unbefitting, and intercourse through the intermedium of legates is far more convenient.

It is, then, from these principles of public necessity and expediency that the public security and sacredness of legates derives its origin, with the consent of nations. Hereon Pomponius says well (*Dig.* 50, 7, 18): "An assault on the legates of an enemy is held contrary to the Law of Nations because of their sacred character; so if, at the time when we declare war on a foreign nation, any legates from that nation are within our jurisdiction, they retain their freedom, consistently with the Law of Nations." So Pomponius.

Because, however, it is at times doubtful whether this or that person is entitled to maintain the character of a legate, it will not be out of place to scrutinize the definition and requisites of a true legate who, by the Law of Nations, enjoys the public protection spoken of. To omit ancient instances, we had a very recent instance of a controversy about the character of a legate in the case of Prince Wilhelm of Fürstenberg, the capture of whom the French denounced as a violation of the Law of Nations but the Imperialists held to be lawful both on account of his being wanting in the quality of a true

legate and because of his subordination to the Imperial Majesty; the monographs on each side set out the principles of the case very luminously.

5 When I look at the matter, I find four things requisite for a true right of legation: (1) Power of the sender, (2) A commission to transact public business, (3) Power of the person to whom the legation is sent, and (4) His consent to receive the legate. I will say a little on these points, one after the other.

As regards the first requisite, Grotius (place named, § 2) and others who follow him insist that the requisite power must be that of full sovereignty; and so, according to them, a Prince who recognizes a suzerain has not got the right of legation. Consequently, an agent sent by such a Prince would not enjoy public safety, certainly not under the Law of Nations, but there would have to be a special law or agreement to produce that effect. Grotius definitely says this of provincial or municipal legates, namely, that they are governed, not by the Law of Nations, but by the Civil Law.

6 I can not but think, however, that the doctrine which only allows a right of legation to fully sovereign powers is nowadays incorrect, unless it be taken to include analogous powers which represent, and in their own right act as the deputies of, full sovereign power; in this rôle, they ought to be capable of 7 the right of legation. It follows, then, that the Princes of our Empire enjoy the right of legation, and that the legates whom they send not only to the Emperor but also to foreign Kings or Republics enjoy public security. For our Princes can enter into treaties and other transactions with the Emperor or foreign powers (*Peace of Osnabrück*, art. 8, § gaudeant); so who will deny that, for the purpose of carrying these negotiations through, they can send legates who are truly such?

8 And no one must say that this is merely our Positive Law, and not a part of the Law of Nations, seeing that (1) from time immemorial the legates of our Princes have in practice been admitted as true legates, within the Empire and outside, in the public conventions about alliances and peace, and such matters, and that they are so admitted to-day. The ducal House of Brunswick-Lüneburg gave a sufficient illustration of this point during the discussion of the Peace of Nimeguen, as the correspondence with the King of England shows (*Actes et mémoires des négociations de la paix de Nimègue*, vol. 1, p. 233, onwards). (2) In order that a person should have the right of legation, it is enough that under the Positive Law of his State he has the right to strike treaties, and make peace, and enter on similar public businesses; for it is by the laws of their kingdoms that Kings exercise their sovereign power, and so it is in accordance with this Positive Law that they, too, can by the Law of Nations send legates to arrange these matters. It is the Positive Law of each empire or republic that gives capacity to enter on these public transactions; and it is the Law of Nations that gives legates public security in order to enable these transactions to be carried through.

It is, then, a universal rule that Kings or Princes who hold their kingdoms and principalities as fiefs, and who admit a suzerainty over them, have a right of sending legates to transact the public business of their kingdoms and principalities. But I willingly admit that if they send them to their feudal superior himself, the legates owe him respect and obedience in the circumstances of the case. Thus, Guicciardini tells us that in the preceding century, when the legates of the Kings of France and England, and of other leagued powers, who were treating with Charles V about peace, prepared to leave without finishing the business, and to break off negotiations, one legate of the Duke of Milan was ordered, as being the legate of a vassal, to stay at the Emperor's court. Such a restriction as this does not, however, destroy 10 the right to send a legation, for even Grotius (§ 2) allows that the parties to an unequal treaty, because they do not cease to be independent, have the right of legation. I conclude, therefore, that both full sovereign powers and also analogous powers, such as Kings or Princes who hold their kingdoms and principalities as fiefs, have capacity to send legates whose safety, as already said, is guarded by the Law of Nations.

But other powers, of whatever magnitude, if merely magisterial, like 11 Viceroy, Governors, etc., have not the right to send legates who will be so reckoned by the Law of Nations. If, however, at any time they send a legation in the name of the King and by his permission, in the interests of the district over which they preside, their legates have by the Law of Nations the character of true legates, because of the authority, not of the Viceroy or Governor who sends them, but of the King.

What of a King or Prince who has been conquered and driven out of the 12 possession of his kingdom or principality? Grotius (place named) says that with the other profits of his realm he has lost the right of legation. Ziegler (same place, note on words *jus legandi perdiderunt*) takes the opposite view, because a King in this situation may still have on his side, and sharing his hopes of a restoration, the larger part, or at any rate a part, of the population. But Grotius seems to have a thoroughly vanquished King in his mind, one who has absolutely no hope left of a restoration by arms, such as (in olden days) Perseus, King of Macedonia, at the time when he sent his heralds to the Consul Paulus Æmilius. Were we speaking of a King or Prince who, though driven out of possession of his kingdom or principality, still relies on his own arms or those of his allies, I think Ziegler's opinion would be right. Thus, Dukes Maximilian and Francesco Sforza were restored to the Principality of Milan by means of an alliance against the French. Now, if while in exile they could form an alliance by treaty, why should they not also be able to send legates, as we have argued above—especially when a King or Prince in this situation can bind himself to certain terms, concerning, for instance, the supply of troops or money for the war, or the giving security, and in making such agreements or promises can of course employ legates?

Further, for the confirmation of the legate's person and rights, a commission 13 for the discharge of his public duties is necessary; and this marks off

a legate from others who have not the support of this great prerogative. And herein lies the distinction between ambassadors, as they are called, and simple nuncios sent by the King or Power, these nuncios having less authority and scope, by reason of the functions entrusted to them. And just as, in private matters, a trust may be given simply, or with a clause of free administration in virtue of which the agent has wider powers (*Dig.* 3, 3: 58 and 60 and 63), so it is in public matters. Wherefore some diplomatic agents are simply styled legates, while others are styled plenipotentiaries. I have indicated this distinction in the rubric and shall consider it later.

14 But why is a commission for the discussion and transaction of public business requisite when a legation is sent for the above-named purposes of congratulation or condolence? Because these are, or are kindred to, public matters, so far as the King or Republic to whom or to which the legation is sent has occasion for rejoicing or for sorrow. As instances I may name the legation sent by Hiero, King of Syracuse, to the Romans, to condole with them on their defeat at Thrasymene and to promise them aid; and, on the other hand, the legation sent to them by Masinissa to congratulate them on the conquest of Africa. Now, the commission itself and the formal demission of the discussion and conduct of a given business (called by us the instructions) are two different things. The former, which (so to say) goes to the legitimacy of the envoy, declaring that he is the legate of this or that King or Republic, must be openly shown; it usually takes the shape of what we call Credentials. The latter is kept secret, unless at any time necessity requires it to be produced (following Fridericus Marselaer and Felbinger, afore-named dissertation *De lege*, th. 5).

15 The third requisite mentioned above was the power of the person to whom the legation is sent. It is considered necessary for him to be the equal of the sender; and hereon Grotius says, "But, in the first place, this Law of Nations, whatever it may be, applies to those legates only whom sovereigns send to one another." Paschal (*Legatus*, ch. 2) ascribes this requisite to ancient practice, saying that it was the traditional usage of Christian Kings to send legations to those only who were of equal dignity with themselves, like Kings and Emperors, an exception being, however, made in favor of certain republics, like the Venetian, Helvetian, and Rhætian, and this for conspicuous reasons. Nowadays, however, Paschal's opinion holds only if we include the great or more renowned Princes; for we find not only that legations are repeatedly sent by Kings to the Princes of Germany and Italy, and *vice versa*, but also that they are sent to and by the Republics in the Empire. And who will deny that these legates enjoy public security under the Law of Nations? Accordingly, just as the Princes of the Empire have rights of sending legations, as shown above, although they are feudatories of the Empire, so, by aid of the same legal principles, they must be held capable of receiving legations sent to their Kings and other powers. And in the same way that the equality required by writers on the Law of Nations, between the sender and

receiver of a legation, is not an equality in area or wealth or power (as my friend Felbinger rightly says, aforesigned dissertation, th. 8), so, also, I would add that in virtue of the foregoing it may be taken not absolutely to be an equality in full sovereignty, but also in that analogue of sovereignty which a given Prince exercises in his own right. You may object, that those ¹⁷ legates whom Kings send to feudatory Princes, or *vice versa*, are not, strictly speaking, ambassadors or legates of the highest rank, but nuncios of less authority. My answer is, that over and above the fact that their claim to be considered ambassadors was clearly vindicated in the discussions at Nimeguen, it can not be denied that the envoys whom these Princes send are true legates. I am not now dealing with the question of the dignity or scope of the legation, but with its character as a true legation which carries with it, as a consequence, public sacredness and protection, and other results of that kind, under the Law of Nations.

I willingly admit, however, that those Princes who are Princes only in ¹⁸ titular rank, and not actually possessors of royal or quasi-royal or territorial power, are not capable of a right of legation either within or without the Empire. For it would be futile for legates to be sent by them, or by others to them, for the transaction of public affairs, they having no right or power over public affairs. I say "no right," for the actual possession of a province may be forcibly taken away by another, without prejudice to the right of sending or receiving legates, as said afore.

It may, however, seem to be some obstacle to this third requirement, ¹⁹ that legates are at times sent to generals in time of war, although these have no royal or similar power. Thus, the Romans sent legates to Hannibal when he was besieging Saguntum, and the Carthaginians sent legates to Publius Scipio in Africa about peace. The reply is easy. Either this may happen in order to avert some danger which delay threatens (as at the siege of Saguntum), or what is done may be done in the name of the State, and not of the general—for which it is necessary that he have a mandate from the King or Republic or that he look for their ratification of his acts. Accordingly, peace and treaties and such-like matters concluded by Roman generals had to be subsequently confirmed by the Senate, as their historians tell us.

Now there comes the last requirement, the admission of the legation. ²⁰ Felden, writing on the aforesigned ch. 18, § 3, puts it well: "Admission is a matter of the first importance as regards a legation, because its inviolability depends thereon. For admission is in the nature of a contract in virtue of which the legates entrust their safety to him to whom they are sent and he promises them safety either expressly or tacitly. And if this safety were not vouchsafed, there would be just cause of complaint." Herein Felden clearly agrees with Grotius, ch. 18, § 5. This being so, legates certainly do not ²¹ enjoy public security before they are allowed admission, the foundation thereof being wanting. Yet in Livy (*History*, bk. 21) there is a speech of Hanno, the Carthaginian Senator, to the contrary, where he accuses Hanni-

bal of a violation of the Law of Nations in refusing the Roman legates admission to his camp; for if the mere non-admission of the legates was, as Hanno thought, a breach of the Law of Nations, the violation of legates who have not been admitted would be a greater breach still. Grotius, however (§ 3), warns us against any such crude interpretation of the law and goes on to say that the precept of the Law of Nations is not that all legations must be admitted, but that none must be rejected save for good cause; and he subsumes the causes on which legations may be rejected under three main heads, namely, as regards the person sending, the person sent, and the nature of the business; and he gives various historical illustrations thereof.

- 22 I do not disagree with Felden and Grotius; but I observe that we have here two distinct questions which must not be confounded: (1) Whether reception, as described above, goes to the completion of the character of the legate, so that without it he can not claim to be a true legate as regards public safety under the Law of Nations; (2) Whether the King or Prince to whom the legation is despatched is bound by the Law of Nations to consent to the legation and to receive it. Now, I draw these distinctions because often something is a requisite of the essential completeness of a person or thing, which, however, some one is bound to furnish. For example, in an investiture with a fief a promise is necessary in order to make a vassal; yet the lord who gives the promise is bound to make the investiture. And so in other like things. Accordingly, a reception by the King or Republic to whom or to which the legation is despatched may be a requisite of the completed character of a legate, whether it be assured that the King or Republic is absolutely bound to receive it or is not so bound. So I will consider each question separately.
- 23 As regards the former, it must be well borne in mind that I am not speaking of a mere mandatary, but of a legate. For alike in private and in public matters, a mandate to deal with a third person can be given without the third person's consent, but thereby that third person becomes no way bound to the other party's mandatary. But more is requisite in the case of a legate; namely, that the King or Republic with whom or with which the sender's business is to be transacted, is obliged to afford him protection and safety. So, of course, the consent of that King or Republic must be interposed as a foundation of this obligation under the Law of Nations. On this showing, then, those who are so sent to transact public business are indeed mandataries of the sender before those to whom they are despatched consent to the legation; but they are not then legates, except in destination only and in an improper sense
- 24 of the word. When, however, the other party adds his consent, they attain the true character of a legation. Grotius, therefore (place named), uses the word "legates" improperly when he asks whether these persons can claim admission at the hands of the Kings or Republics to whom they are sent, seeing that, as just said, they are certainly not legates before this reception. For it would be extremely hard that a person should be bound to transact business and guarantee safety against his wishes and despite his objections.

For the rest, I have no doubt that the consent to admission may be either 25 tacit or express. As to the latter, no question can arise; but I must make further enquiries about the marks from which the former can be presumed. I hold, then, that a King who knows that a legation is being despatched to him, and who does not make objection, consents thereto; for his knowledge, coupled with his silence and the absence of any protest, amounts to a tacit consent, especially in those matters where a declaration of intent is essential. (This is clear from *Dig.* 14, 4, 1, 3; and 19, 2, 13, 11, at *hoc enim ipso*.) And this principle must be emphatically asserted concerning the public business of a legation; for it is of national importance that legates make their agreements quickly, and that there be no unavoidable delay in the discussion of peace and treaties, and the like. Now, such delay would arise if these persons were left in doubt as to their own character after the announcement of their approach as a legation had been made and the other side had not signified its disapproval. And I go so far as to say that, by virtue of this general 26 tacit consent, these persons must as legates enjoy public security, even though the King (or Republic) to whom the legation has been despatched would probably not have received them had he known who they were; for he has only himself to thank for not instituting more precise enquiries about the individuals who composed the legation. It is quite different where a King protests, and shows his disapproval, whether as regards the legation as a whole or as regards certain members of it.

This shows how necessary it is that a Prince or King to whom a legation 27 is sent should make himself informed on these points. And this is especially attended to in the case of Turkish legations to the Emperor, prior notice of whose approach is usually given to the Imperial Court. The Dukes and Princes made notable use of their principle of the Law of Nations at the siege of Trier, when the besieged French sent to them to arrange a withdrawal; for as the envoys had not first obtained a safe-conduct, they were detained as captives.

To the second of the two questions above named, Grotius (place 28 named) gives an affirmative answer, at any rate when there is no just ground for refusing the legation; and as the existence of just ground is not presumed, it will, according to Grotius, be the rule that legations should be received by Kings or Republics who or which have been informed about them, and it will be an exception if a just cause of non-reception be furnished. It seems sounder to me, as regards the bond of the Law of Nations, to frame the rule in the negative, to the effect that, whether there be or be not a just cause for refusing to receive a legation, it is no breach of the Law of Nations to decline to receive it, although a groundless refusal is an offense against the duty of humane behavior. The reason is obvious. An agreement about a 29 treaty, or peace, or truce, or neutrality, and such-like affairs for which legations are usually sent, is a matter of mere discretion as regards the King or Republic to whom or to which the legation is sent; and the existence of a

just cause is not a prerequisite of the consent of the King or Republic to the completion of any of these affairs. Therefore, the admission of a legation which has that as its aim and object will also be a matter of mere discretion, without any consideration whether a just cause is present or not. Further, that it is in some sort an offense against the duty of humane behavior for a King or Republic to decline to receive the legation of another power without just cause, is deducible from the principle which operates also in private matters, that he who prefers the rigor of justice to a peaceful compromise, may to that extent be called inhumane (by inference from *Dig.* 3, 2, 6). Much more should this principle prevail in public matters because of the greater interests at stake. As is well known, Gustavus Adolphus, King of Sweden, included among the causes of war with the Emperor Ferdinand II this, that his legates had not been admitted to the conference of Lübeck.

30 From what has been said it is, then, sufficiently apparent how the person of a legate should be defined. We may aptly say that *a legate is a mandatary in a matter of public business, sent by a sovereign power or by the analogue of a sovereign power, to another like power on a condition, express or tacit, of safety, to propound, discuss, and carry through on behalf of the sender the business entrusted to him.*

31 Further, legates must be classified according to the difference in their commissions, one kind being higher, whom we call ambassadors, and another lower (envoys). Then, again, some are plenipotentiaries, to whom the transaction of a business with free power is entrusted, as Scipio Africanus was entrusted with the business of making peace with the Carthaginians; and others are confined within the four corners

32 of their instructions or mandate. For the rest, legates are sometimes distinguished into *legati nati* (legates *a latere*, i. e. "from the side") and *legati missi*. The former of these two kinds are so called because the duties of a legation are annexed to some dignity, and directly a person is promoted to this dignity he is deemed a legate. For instance, the Archbishop of Rheims in France is such a legate (c. 17, X. 1, 17; and c. 13, X. 4, 17); so is the Archbishop of Toledo in Spain; and so formerly were the Archbishops of Canterbury and York in England (c. 1, X. 1, 30; c. 1, X. 2, 28. Azor, *Institutiones morales*, part 2, bk. 5, ch. 27). These, according to the received opinion, are called Cardinals (*cardo*, a hinge), because their activities are exercised at or from the side of the Pope who sends them. The latter class are the rest who are sent as nuncios. This distinction, it should be added, is due to Papal constitutions and the Court of Rome (texts cited and c. 1, bk. 1, 15, in vi).

33 Now, when the aforementioned requisites of legations are present, legates enjoy (1) the privilege of public security by common consent of nations. And therefore the King to whom they are sent is bound to furnish them with safe-conduct within the boundaries of his realm; and, if they come to harm there by the act of the King or his subjects, or at any rate by an act of theirs which the King could have checked yet allowed to be done,

34 the King is bound to recoup them their loss. But in order to prevent any one

from attacking legates or their suite in ignorance of their identity, it is usual for them to have some public badge of office which they can at need show to any aggressors. To this end, Roman legates in days of old made use of *sagmina*, a kind of herb; and Greek legates made use of a wand, as Marcius says (*Dig.* 1, 8, 8, 1); and we read that the facials used a wand also; and it was expressly enjoined by Senatus consultum on those who were sent into Africa to form an alliance, "that they should carry with them flint stones of their own and vervain of their own"—for duly carrying out the ceremonies of the alliance—"that the Roman prætor should command them to form the alliance, and that they should demand of him herbs." (Livy, *History*, bk. 30.) Livy adds that the kind of herb usually given to the 35 facials is gathered on the Capitol. Roman legates and facials, therefore, were in this way rendered safe by the national badges of their legation and office. Nowadays letters of safe-passage and safe-conduct, commonly called passports, are handed to the legates of Kings, Princes and Republics, the better to enable them with safety to make the journey to the place of meeting and to transact there the business entrusted to them. These documents differ from the *sagmina* which brought security to the Roman legates of old in that they are granted on public faith by the King or people to whom the legation is despatched, and not merely by the power that sends them.

Now, this privilege of safety which I have spoken of belongs also to 36 the suite of a legate (*Dig.* 48, 6, 7), and also to their movable property which is used for the purposes of the legation (Grotius, bk. 9, ch. 18, §§ 8, 9).

This privilege does not affect any third party to whom the legation is 37 not sent, especially if the object of the legation is prejudicial to him, such as the concerting of hostile measures against him. The Romans therefore were within their right in intercepting the legates sent by Philip, King of Macedonia, to Hannibal, with whom Philip was on the point of making an armed alliance against the Romans. The reason of this assertion is not obscure, seeing that a promise of safety made either expressly or tacitly to a legation binds only the promisor, and certainly not any third party. Legates, then, do not possess this character in respect of any third party, but only in respect of him to whom they are sent.

Further, the guarantee of public safety is put an end to if the legate 38 himself resorts to violence. For, it being permissible to repel force by force, according to the principles of the Law of Nature, as said above, even to the killing of the assailant, a legate who makes a forcible attack on another may undoubtedly be resisted and even killed by the attacked party. The same must be said of a legate guilty of hostile machinations against the King or Republic to whom or which he is sent, although Grotius (ch. 18, § 4, at *verum is apex*) would not concede, even in such a case, the right to put a legate to death, but only a right to detain and question him, his reason being that these measures are adequate to avert the extremest danger of the hostile machinations of the legate. For my part, I should prefer to say that a legate 39 guilty of hostile machinations against the King or Republic to whose pro-

- tection he has entrusted himself has, by that fact, forfeited his character of legate; for the promise of safety under public good-faith was given to him as being about to transact the public business of his commission, and not as being about to conspire against the giver. If the legate does not observe the tacit condition of the gift, he makes himself unworthy of the aid of the Law of Nations, and the King or Republic to whom or to which he is sent is not in this case, which was not in contemplation or within the agreement, bound to afford him public defense. And so I agree with Ziegler, in his *Notes* on the aforesigned passage of Grotius, that a legate who is guilty of treason against the King or Republic with whom or with which he ought to be conducting the business of his mission, may even be put to death, provided that
- 40 his guilt is notorious or can be certainly proved. And if, even in such a case, it be not lawful to punish the legate, because, as Grotius holds, of want of jurisdiction, yet he could be killed like any other enemy, having shown by his conduct that he is not a legate, but an enemy. Surely the safety given to legates under the Law of Nations is not to be extended so as to make it a license to offend with impunity.
- 41 The question arises, Suppose it be not the legate who is in fault, but that the people by whom he has been sent have previously done a wrong to a legate of the other side, is it permissible to visit this offense on him? Certainly not; for he who subsequently receives a legate pledges his faith to him, and this faith must be kept, and not broken on any pretext of the former injury. Xerxes, King of Persia, whose legates had been violated at Sparta, when others were sent from Sparta to expiate this offense, said that he declined to imitate the Spartans in their breach of the Law of Nations (*Herodotus, Polymnia*). Nor would Scipio Africanus avenge the perfidy of the Carthaginians, who had attacked his fleet during a truce, upon the legates who came after his victory to ask for peace.
- 42 (2) Legates enjoy the privilege of the domestic forum, it not being permissible to sue them during the continuance of their legation in the foreign place where their duties lie. This is also laid down in Roman Law (*Dig. 5, 1, 2, 3*). The privilege in question is founded on the idea that they are outside the jurisdiction; and on this point Grotius neatly says (ch. 18, § 4): Nations have agreed that the common usage whereby a person who is in a foreign territory is subject to the Law of that place, shall admit an exception in the case of legates; for just as they are taken, by a fiction, to bear the person of him who sends them, so also, by a similar fiction, they are reckoned as being outside the territory." The case, and the rule that applies to it, are both clear enough; but how far the rule is to be extended or restricted is not free from doubt.
- 43 Paulus writes (*Dig. 5, 1, 24, 1*) that legates can be compelled to submit to trial at Rome for delicts committed in the course of the legation, whether by themselves or by their slaves. Grotius (§ 4) gives this a wide interpretation. He draws a distinction between more heinous offenses and minor offenses in his answer to the question about the forum of legates in delicts;

but it all in effect comes to this, that they can not obtain a forum in the place where the delict is committed, but only the forum of him who sent them. And Grotius does not concede to the King or Republic in whose territory the wrong was done by the legate, any right to do more than order him to quit the territory and send him back to his sender for punishment or surrender. Felden (on Grotius' § 4) gives a general approval to this. But in common with others I take the opposite view, certainly as regards those wrongs which directly injure the Prince or King to whom the legation is sent, or even his subjects. For I think that then the King or Prince or Republic can, without any breach of the Law of Nations, exact redress for the wrong done, if it be reparable. For instance, suppose the legate has committed arson, or caused 44 arson to be committed, what could be juster than that he should be compelled by the Prince or King in the place where the legation is, to make good the loss to the sufferers? To send him back home on an off chance of obtaining by reclamations some precarious redress, with the alternative of a threat or a declaration of war, as some suggest, would be much more inconvenient than that moderate interpretation which we advocate of the Law of Nations concerning a legate's immunity from suit.

But if the wrong done to the King or his lieges be irreparable, as in the 45 case of adultery or rape or homicide, and the like, I think that punishment may still be exacted, as pecuniary redress is impossible, though even here the circumstances of a homicide may at times be such that the legate may be made to pay, say to the wife and children of the killed man, an expiatory sum of money (*Sühn-geld*, in our tongue) in regard of the loss caused to them by the homicide. That the Law of Nations permits the punishment of a legate in such a case, is shown by the principle set out a little above, namely, that admission under public faith is granted to a legate on the assumption that he is there in order to transact the business entrusted to him, and not in order to commit a delict. That must have been what was in the mind of Theodosius (Procopius, *De bello Gothicō*, ch. 1, quoted by Grotius) when he declared "that the name of legate was sacred as long as the legate maintained the dignity of his legation with due circumspection; for men held it right to kill even a legate who did a wrong to their Prince, to whom he was sent, or who dishonored another's wife."

As regards other wrongs, not committed against the King or his lieges, 46 Grotius' fiction of the exterritoriality of a legate may be allowed, his punishment being left in the hands of his sender, who must be notified of the wrong done. The reason of this difference is easy to see. In the former case, the legate not only does a wrong, but he really violates his legation; for, just as the King, in virtue of his reception of the legate, is bound not to suffer any wrong to be done to him by himself or his men, so, in virtue of the public 47 safety which the legate enjoys, he in his turn is tacitly bound not to do any wrong to the King, or the royal family, or the King's lieges. For even privileged persons are bound on principles of the highest equity by the edict "*quod quisque juris*" (by inference from *Cod. 7, 51, 6*). If, then, a legate

transgresses those limits, he is bound to the King (or Prince, or Republic) and those of his lieges whom he has injured, not in his quality of legate but by reason of the loss which he has caused to them, and of the breach of the good-faith tacit in the legation. Consequently the legate must, according to the distinction we have drawn, either redress the loss caused or submit to a fine or penalty, and so expiate the wrong in that very place where it was done. This principle, however, is inoperative in delicts done by the legate not against the King to whom he is sent or the King's family or lieges; and so a different rule obtains in the case of these delicts. And those considerations which we have laid down about the non-exemption of a legate in matters of delict apply with especial force, if the case having been remitted to the sender of the legate, he neither punishes him nor compels him to make satisfaction for the wrong done.

- 48 Besold (*Synopsis doctrinæ politicæ*, bk. 2, ch. 8, § 2, n. 15) draws the distinction in a slightly different way, namely, between wrongs which are a violation of the duty of a man and those which are a violation of the duty of a legate; and he would leave the former to be dealt with by the offending legate's sovereign. And as to the latter, if that Prince did not punish him, it would be just to treat the legate as an enemy. But this doctrine labors under the disadvantage of remitting, generally and indiscriminately, to the Prince
49 who sends the legate, the offenses of adultery, homicide, and the like; whereas, as regards such offenses when committed against the King's family or subjects, as said above, the Law of Nations does not give the legate any privilege of the forum. Nay, in wrongs of this class the legate may be said to be guilty of a breach of his duty as legate, because in his quality of legate he is bound to behave towards the King to whom he is accredited, and towards his lieges, in the way which good-faith demands in return for the safety guaranteed to him. I abide, therefore, by my own distinction; but I admit that, if a case actually arose, a King might sometimes do better not to punish an offending legate sent to him by another, but to remit the whole affair to that other, as our own ever-victorious Emperor did a few years ago in the case of the Spanish ambassador—not because no other course is open by the Law of Nations, but in order to avoid offense to the legate's master and a sequel of greater evils. And there may be other reasons, too. (See the aforesigned dissertation of the excellent Dominus Felbinger, th. 27.)

So much concerning delicts.

- 50 In matters of contract, also, the privilege of the forum is claimed for legates, with the result that they can not be sued in the place of their legation, but only in their home forum. Indeed, precisely the same principles that are applied in the case of debtors resident abroad are applied in their case. So says Grotius (ch. 18, § 9). Wherefore, according to Grotius, if the King who sent the legate does not do justice at the instance of the creditor, reprisals may be resorted to against the goods of his subjects wherever found. But here, in one event, Roman Law does not recognize such a privileged forum in matters of contract; and that is when the legate has made the contract during

his legation and in the place of his legation, for he thereby has tacitly renounced his privilege, with the result that he can be sued there (text in *Dig.* 5, 1, 2, 4; but, in a contrary sense, text in *Dig.* 1, 2, 25).

But some one may urge that the legate can not renounce this privilege to 51 the prejudice of his master, whose dignity would be affronted if his legate were tried in the place of the legation; and that the texts of the Civil Law do not go so far as this, because they probably apply only to legates of municipalities, to whom positive law, in compensation for the burden of the legation, gave the privilege of not being compelled, as a rule, to submit to trial at Rome, and of being enabled to claim a home tribunal. There would then be no obstacle in the way of their surrendering a privilege primarily introduced in their own interests; but a different principle is apparent in the case of legates of Kings and free peoples.

However that may be, I think it more correct to say that even such 52 legates may justly be compelled to perform the contracts entered into by them in the place of their legation and during its continuance, although a friendly demand of performance ought always to come first. If performance be not then forthcoming, the cause should be referred to the legate's master, if that can be conveniently done; and, if not even he can compel the legate to perform, he will have less ground for complaint of a violation of the Law of Nations, should the legate thereafter be compelled to perform by the public authority of the place of the legation. This is supported by the following reasons: (1) Besides that it is unworthy of a legate's position, it is also manifestly unjust that he should have received something on loan or on deposit during his legation and, instead of returning it as the good-faith of the contract demands, should propose to misuse his title of legate for defrauding his creditors who have contracted with him in the place of his legation. Julian, in *Dig.* 5, 1, 25, considered this reasoning unimpeachable, and it applies equally to the legates of a King or free people and to the legates of a subordinate city-state. (2) In private contracts the legate does not represent the King or 53 people who sends him, but only in the discharge of public business. (3) The Law of Nations does not aid legates who behave fraudulently or who make gain out of another's loss, in violation of the good-faith of the contract; and the sender has only himself to blame for sending such a legate, or not compelling him thereafter to perform his contract. Accordingly, in liquid claims, arrest or seizure of the legate's property or other like executive process may be employed against him in the place of his legation without any breach of the Law of Nations. But in non-liquid claims I adopt a different rule. For, legates who have come on public business ought not to be entangled in the folds of a doubtful or anxious lawsuit; moreover, claiming creditors must blame their own negligence in not securing better proof. And I disapprove of the 54 contention that the creditors of a legate should be paid out of public funds, and the amount be reclaimed from the legate's master; for creditors must thank themselves for contracting with legates whom they knew it would be difficult to sue. This is a point which in some sort may be objected against

creditors even of liquid claims, with the result that they can not claim payment of money lent to a legate from their sovereign or State if he or it decline, for good reason, to employ the admitted right to exact payment from a legate.

55 For although, for reasons given, this can be done in the case of a liquid debt, yet there is no absolute necessity that it should be done. So not even in this case is the community to be burdened with the payment of another's debt, should considerations of public policy prevail and execution against a legate be abandoned in view of the graver difficulties it would cause; for it was of his own free will that the creditor of the legate sustained loss in such a case, and so he ought not to be recouped at public expense.

Briefly, as regards executive procedure on a debt contracted during the continuance of the legation, and liquid, I think the forum of the place of the legation is well founded, provided there has been a prior notice served on the legate, and an attempt to obtain payment has been made in his home forum without success; but the better opinion is that the opposite holds of non-liquid contractual claims, even as regards ordinary procedure.

56 What about post-mortuary succession? If the legate be heir, whether under a will or on an intestacy, in the place of the legation, arrest of goods may take place there against him, according to *Dig.* 5, 1, 26 and *Cod.* 3, 20, 1. This, however, is not so if what is forward is a challenge by action of his right to be heir; for this is a matter which concerns the place of his domicil, or the place where the property is situate if the defendant resides there (*Cod.* 3, 20, 1). But a legate is not considered to reside in the place of his legation for the purposes of choice of forum, as said before.

57 Others distinguish between movable and immovable property. No action can be brought in regard of movables in the place of the legation, even those which the legate has there, because they are considered as attached to his legal person and actions relating to them must be brought in his place of domicil, although, as said above, there may sometimes, on the ground of delayed performance of a contractual obligation, be an arrest of such property in the place of the legation if it has been acquired there during the continuance of the legation. Immovables are subject to the laws and jurisdiction of the place where they are situate: and so, if the legate possesses immovables in the place of the legation, he can be sued there; and, even if the cause of action really arose in the place whence he came, still such an action would lie in the place where the immovables are situate (*Cod.* 1, 19, 3, and doctors thereon; Alexander, of Imola, vol. 6, cons. 19). And this holds even if we admit Grotius' fiction of the exterritoriality of a legate, for a legal fiction can not prevail over the true facts of the case.

58 I think this distinction is a sound one as regards actions asserting a real right over individual things, but not as regards a claim as heir to a university of rights. The connexity of the case would be split up if the immovable part of a succession had to be sued for in the place of its situation, but the movable part in the place of the domicil; so it is better for the whole succession to be subject to the jurisdiction of the forum of the domicil in the event of a

claim against the legate who is in possession of the property. That a suit concerning an inheritance is elsewhere called a personal action of the mixed kind, is in favor of the view here stated.

What about debts? They are things personal and, as such, are subject 59 to the privileged forum of the legate, according to opinions in Pérez, on *Cod. 3, 20, 1*, at end. A different rule applies to real rights or those which are treated as real; for, although a legate is not bound to observe the formalities prescribed by the Law of the place of the legation when he makes a contract there, yet it is otherwise with regard to real rights. Accordingly, if the local Law requires registration for the creation of a charge on immovables, the legate, when bonding himself to create a valid charge thereon, must comply with the requirement of registration in a matter so subject to the local Law. The same holds in the acquisition of ownership and such like, by parity of reasoning. For, albeit appointed from outside, he is making an agreement about immovables situated in another jurisdiction, and he must comply with the laws of that jurisdiction relating to real rights. (See *Christinæus, Decisiones Belgicae*, vol. 2, decis. 3, n. 2.)

What about adoptions, emancipations, and any similar act of the voluntary jurisdiction? They are personal matters, and must therefore be governed by the Law of the legate's domicil and not by the Law of the place of the legation.

A third privilege is that of religious worship. This is allowed in the 61 legate's house, during the continuance of the legation, even though his form of religion is not allowed in that country (*Marselaer*, bk. 2, dissert. 15, towards end). Thus, in the year 1665 the Turkish legate at Vienna performed the exercises of the Mahometan religion; and similarly with regard to the different forms of the Christian religion, we find the same freedom of worship allowed, if not in public, at any rate in private, although the degree of freedom varies in different places.

Several other privileges of legates are usually named, as by Felbinger (*Dissertation*, th. 10); but they are matters of Positive Law. Further, Grotius (ch. 18, § 8) examines into the jurisdiction over the suite of a legation and into the right of asylum in the legate's house, and arrives at the correct conclusion that these do not pertain to the legate by the Law of Nations. He thinks that they come from the indulgence of the sovereign to whom he is accredited, but only in a secondary manner, and that their prime source is in the grant of the sender of the legation, inasmuch as it is for him to say what power his legate is competent to exercise. I am inclined to say that in doubt 62 a certain amount, at any rate, must be taken to be granted, since otherwise, if the legate had no jurisdiction and authority, the business of the legation might be hindered. For he who means any one to perform the functions of a legate must be presumed to mean to give him as much power over his suite as is necessary for keeping order in his little realm (by inference from *Dig. 2, 1, 2*, and the doctors thereon).

63 The qualities of a good legate are: (1) Knowledge, especially of the Law of Nations and of Public Law, so that he may be equal to the conduct of his business; (2) Industry in action, which ordinarily comes from good natural parts and their proper use; (3) Eloquence; (4) A good presence: and so Cato made game of the Roman ambassadors who were sent to make peace between Kings Nicomedes and Prusias, of whom one legate had a badly scarred head, and another limped, and the third was weak-hearted, saying that this embassy had neither head nor heart nor feet (*Livy, History*, epitome of bk. 50). Of course, many other virtues are required in a legate, but they are common and do not call for discussion here.

64 Now, the duty of a legate is mainly twofold: (1) To execute his public mandate with the utmost fidelity, (2) To note and report the answer he receives, with the greatest care. These two can scarcely be expressed in any certain and precise rule, but depend on that industry in conduct which I mentioned just now. The former duty has to be observed towards the King or Republic with whom or with which the business of the legation is performed; the latter, towards the sender of the legation.

65 In this connection the question arises, What if the legate has different mandates, one express and the other tacit? My answer is, that he must execute his mandate in accordance with his instructions, so that, if he be tacitly forbidden to do something which is entrusted to him by the express mandate, he must adhere to the tacit instructions. All the same, if, in this case, the legate do something contrary to his secret instructions, but in accordance with the express mandate, the better opinion is that he binds his mandator; because a tacit commission must, in its effect on the foreign King with whom the business is transacted, be regarded as a mental reservation such as can not be allowed to weigh in human, and especially in foreign, affairs. For there would be no certainty in human conduct if the issue of secret instructions could be alleged against the King or Republic with whom there has been a dealing through the intermediation of legates furnished with an express commission. Grotius (bk. 2, ch. 11, § 14) agrees. The same thing undoubtedly obtains when Kings or Powers mutually send legates to some definite place to represent their person, as was done in the negotiation of the Germanic Peace of Osnabrück and Münster and of the recent Peace of Nimeguen.

66 What about plenipotentiaries? Are their acts valid, no matter how prejudicial to their sender? I think not, on the argument from the analogy of private matters, in which a mandate with full power is not taken to empower waste or gifts (*Dig.* 39, 5, 7), and in which a free discretion vested in another means the discretion of a good man (*Dig.* 38, 1, 30). We see, then, that the acts of a plenipotentiary need to be ratified by his principal, as was done not only in the ancient Roman Republic in the case, already adduced, of Scipio Africanus, when the Senate approved and ratified with its authorization the peace which he had previously been allowed free discretion to make with the Carthaginians, but also in our own day in the beshrouded negotiations of peace at Osnabrück and Münster and at Nimeguen.

So much on this topic.

CHAPTER XV.

Of the Laws concerning Sepulchers.

SUMMARY.

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| 1. Sepulchers by the Law of Nations inviolable. | 19. Such suicides as have been moved by honorable reasons, though wrong-doers in sight of heaven, are allowed honorable burial. |
| 2. Modes of sepulture various, but more usual to bury bodies in ground. | 20. Otherwise of wanton suicides. |
| 3. Laws as to sepulchers fall under two heads. | 21, 22. Examples of suicides. |
| 4. Sepulture not to be denied to an enemy. | 23. Judgment on them to be left to God. |
| 5. Sepulture sometimes denied to Jewish Kings as a mark of Divine punishment. | 24. Penalties of violation of tombs. |
| 6. The dead bodies of executed convicts to be buried. | 25. Whether the tombs of enemies are sacred. |
| 7. Examples to the contrary. | 26, 27. Examples of the burial and non-burial of enemies. |
| 8. Remedies provided in Roman Law for the protection of funerals. | 28. Barbarous to insult the corpses of dead enemies. |
| 9. By a law of Numa Pompilius a woman who died pregnant was not to be buried until the foetus was removed. | 29. Burial of enemies not enjoined by Law of Nations on their enemy. |
| 10. The body of a killed person not to be buried before examination by physicians and surgeons. | 30. Otherwise from the standpoint of humanity and the Gospel rule. |
| 11, 12. Burials at present time considered public matters; frequency of private tombs. | 31. Not to forbid the burial of dead enemies congruent with the Law of Nations. |
| 13-18. Should suicides be deprived of burial? | 32. <i>Actio funeraria:</i> its priorities; and its natural equity. |

The laws concerning sepulchers are kindred to those concerning legations, in that by the usage of nations they enjoy nearly equal sanctity, it being deemed sinful to violate the bodies of the dead, by whom no one can be hurt any more. According to Herodotus, the Scythians would challenge Darius, King of Persia, who had invaded their land with an army, to fight and to the avenging of insult by saying that there were the mounds and graves of their ancestors, and that if any one did hurt to these he would find out that they themselves were men and ready to take vengeance for the act.

Now, of the modes of sepulture I agree with Grotius (*De jure belli ac pacis*, bk. 2, ch. 19, § 2) in thinking that the most suitable to nature is to return to the earth our earthly part while the spirit returns to God, Who gave it, as is said by King Solomon in *Ecclesiastes*, ch. 12, v. 7. Still, it is undeniable that different nations adopt different funeral methods, such as cremation, which prevailed among the Indians and ancient Greeks and some Latin peoples; or as suspension in fixed places, which is attributed to the Circassians and Tartars in Oertel's *Tabulae Geographicæ*. But as I am more concerned with Law, I do not think it relevant to enquire further into the funeral ceremonies of different peoples.

3 Now, the Law on this matter relates mainly to two matters: (1) The unhindered performance of sepulture, (2) the public security and sanctity of the same. As to the former, it appears received in the usage of nations that dead men's bodies should be buried and that no hindrance should be offered to this. Grotius collects various historical instances of this (ch. 19, § 1), and in § 3 agrees that sepulture is due even in the case of enemies, citing the examples of Hercules, Alexander the Great, Hannibal, and the
4 Romans; for the same principle as I mentioned above, applies also to an enemy, namely, that no one can be hurt any more by the dead. And if at times there be a departure from this rule, I believe it is by way of punishment or of retaliation, as if by application of the edict, *Quod quisque juris*. The latter explains David's threat to Goliath, that he would give the carcases of the Philistines to the wild beasts for food, because Goliath had used the same threat to David in order to frighten him from the single combat.

5 And in the same connection we have the words of the prophets, whereby God, by their mouth, foretold to some of the Israelitish Kings and their families that they would go unburied. This does not mean that such a thing is in itself right by the Law of Nature and of Nations, but that God foresaw what bitter enemies these persons would be and designed to use their savagery for the purposes of punishment, or at any rate foreknew that this would be the issue. We have an instance in the impious Jezebel, wife of Ahab. Elisha had predicted that she would be devoured by dogs; and, after she had been thrown down from the window, Jehu, the avenger of the sins of Ahab's family, ordered her burial: but the dogs had already anticipated this common dictate of humanity and, acting as the executors of the Divine decree, had devoured almost the whole of the queen's corpse. See, then, that even in the case of this accursed queen, the precept of humanity would have prevailed, had not the Divine wrath ordered it otherwise for the purpose of punishment.

6 Further, the same holds in the case of criminals: if they are at times denied burial, it is as a special punishment or for some other like reason. Tacitus (*Annals*, bk. 6) records that Tiberius forbade the burial of the bodies of those who had been executed by way of punishment; and Suetonius, in his *Tiberius*, gives the words of the prohibition, "Let none of the relatives of the condemned mourn for them, and let every one of the condemned be dragged by hooks and cast upon the Gemonian steps," the intent being that this dishonoring treatment of the corpses would deter the living from sedition and revolutionary projects against the Emperor.

7 It was with the same motive that the Popes denied church-burial to heretics; namely, to deter the living from copying them. And the same may be said of manifest usurers, and of those killed in duels and tournaments, and of others mentioned in c. 2, bk. 5, 5, in vi, together with glosses thereon; c. 1, X. 5, 13; Cardinal Tuschus, vol. 7, concl. 188, letter S.

Again, the intention of civil sovereigns is the same when they order the corpses of those executed for treason to be preserved or hung for a public memorial; to wit, that others, having this mournful sight always in their eyes, may abstain from similar conduct. And this is also done in the case of noted robbers, by way of deterrent and also by way of solace to the kindred of their victims (*Callistratus*, in *Dig.* 48, 19, 27, 15).

But apart from these exceptions which depend on special causes, it is well to abide by the rule that the bodies of the dead, whoever they were, must be buried. We have in this connection, in Roman Law, the edicts *de mortuo inferendo* and *de sepulchro ædificando*, by which the prætor protects from violence those who are carrying a dead body to a befitting place and those who are building a tomb (*Dig.* 11, 8, 1, pr. and 5). We also see, in *Dig.* 11, 7, 38, that the convoy of a funeral was similarly protected; and a severer penalty was enacted against offenders by Justinian (*Nov.* 60, pr. and 1).

Although this be so, yet circumstances of time and place are sometimes such that it is not permissible to bury the dead at will. As regards time, we 9 have two instances. One is that of a woman who has died while pregnant; by a law of the kingly period, attributed to Numa Pompilius, it is forbidden to bury her before the foetus has been excised. We do not adopt this in our usage unless there be clear indications that the foetus is alive after the woman's death. Another is the case of one who has been killed; the body may 10 not be buried before a medical and surgical examination, the idea being to obtain greater certainty about the deadly character of the wound. A third instance may be added, of bodies made over to anatomical investigation; but this is matter of grace, not of Law.

As regards place: in olden days tombs were erected at private discretion, 11 except that a rescript of Hadrian disallowed burial within a city (*Dig.* 47, 12, 3, 5); but at the present day, in the Christian world, burials are public. Some private persons, however, are by privilege or by usage allowed special tombs, called by their families or successors by names which indicate they belong to a family or are hereditary, such as *Geschlecht-* or *Erb-begräbnisse*. At times, too, these are granted in virtue of office, as when professors in this place are buried in the church of St. Peter. Public burial is now so much the 12 rule that it has begun to be a part of Public Law, every private person being on death properly buried in his parish; but I can not ascribe this to the Law of Nations, it being rather due to papal ordinance or to the adoption of such ordinance by usage.

Further, it is a question whether suicides ought to be deprived of burial. 13 Grotius (ch. 19, § 5) thinks they ought, by reference to the institutes of the Jews and some other peoples. But the contrary is what we read in Tacitus (*Annals*, bk. 6); namely, that in the reign of Tiberius the bodies of those who had taken their own lives were buried, and their testaments were upheld—a recompense, this, for commendable haste! In his notes on this passage,

Lipsius adds that this is not remarkable, for they were not condemned or found guilty. But if we compare our Marcian, in *Dig.* 48, 21, 3, pr., we find that this is remarkable in view of the legal doctrine there laid down, that those who have laid hands on themselves because of their knowledge of a criminal accusation against them have no heir, even though not condemned, but only arraigned, as was the case with the suicides whom Tacitus mentions. And this can easily be seen in the case of Mamercus Scaurus and others named by Tacitus, who, after their arraignment, anticipated their sentence by a voluntary death. But these and many other happenings under Tiberius we ascribe to his tyranny and political shifts. Nevertheless the laws of Rome, especially
14 of later times, as already said, were to the contrary. For it is inconsistent with the simplicity of the Law of Nations that those who kill themselves should be utterly deprived of burial, seeing that all they have done is to withdraw a man from the civil society; and if any one urges that they have violated the Law of Nature which ordains self-defense, I reply that other homicides, to whom burial is nevertheless not denied, violate the same Law, it being a breach thereof for man to prey on man, or do him wrongful hurt,
15 or take away his life. And I see no force in the argument from punishment, namely, that if the bodies of suicides were not treated in some such punitive fashion, that kind of offense would go unpunished; for the answer is, that suicides, by their very act, punish themselves, in depriving themselves of life, which even by itself is the severest punishment, so that there is no need of the kind of punishment against corpses in order to dissuade survivors, seeing that Natural Reason itself dissuades men from such an offense and we have no natural inclination to commit it.

16 Far less difficult are the cases where necessity leads persons to kill themselves or offer themselves to death, as when a man sets fire to some great fortress or ship and perishes in the act, serving his country by preventing the fortress or ship from falling into the hands of the enemy. Who would deprive such men of the honor of burial, if any bones or other parts of their bodies were found? The same holds if, on the capture of a town, matrons or maids of good name throw themselves into the sea or river rather than lose their modesty to hostile force. Granted, that according to some moral philosophers this choice is not wholly praiseworthy, still it does not deserve such a punishment as this, to wit, that these persons, lofty of soul even if we assume
17 their act excessive, should go unburied where burial was possible. I have no wish to champion suicides, as if their deed were lawful; but I deny that, at any rate by the Law of Nations, they must be refused burial. Especially is this so when a good cause for suicide is present, either public good or private honor. It is usual to decry the example of Razius, as appears from St. Augustine's *Letter to Dulcitus* and in Luther's preface to the book of *Macchabees*; but that does not involve that Razius, when dead, ought to have been denied burial. We read in Tacitus (*History*, bk. 2) that funeral rites were prepared and a tomb constructed for the Emperor Otho, who killed himself

after his defeat at Bedriacum by the forces of Vitellius. And the same writer tells us that some soldiers imitated that kind of death either on the pyre of their Prince or in camp, not guiltily through fear, but in their eagerness for honor; and it is not likely that they went unburied for an act which they, however mistakenly, thought would win them renown.

In sum, suicide is not a cause of deprivation of burial; the foregoing has, 18 I think, made that quite clear. Much less, if the reason be necessity, or honor, or the public good. It may be inferred, then, that an act in itself unlawful is forgiven to the bodies of the dead, out of human pity and because of the survivors.

A distinction, nevertheless, remains with regard to funeral rites. For 19 he who lays hands on himself for an honorable reason, as Cato of Utica did after taking up arms for the Republic against Cæsar, is not to be deprived of honorable burial, although he would have done better to bear his wrongs. Aïruntius, in Tacitus (*Annals*, bk. 6), made a spirited reply to his friends who strove to reconcile him to a longer life, “ He had had enough of life; and all he regretted was, that he had endured amid scorn and peril an old age of anxious fears, long detested by Sejanus, now by Macro, always, indeed, by some powerful minister, not for any fault but as a man who could not tolerate gross iniquities. . . . He now foresaw a still more galling slavery and therefore sought to flee alike from the past and from the impending future.”

He, however, who wantonly commits suicide is indeed buried to-day, 20 but not with honorable rites; so that a certain ignominy awaits those after death who, by laying violent hands on themselves without any justification, have deserted their post in this life, as Plato also declared (*Laws*, bk. 9). It is different, as I have said, if an honorable cause be present, even when a man dies by his own hand—not, indeed, by the Law of heaven, but I think that it is probable by the External Law of Nations.

Cicero (*Tusculan Questions*, bk. 1) well said of the death of Cato: 21

“ Cato quitted this life well pleased with having a just cause to die; for that God Who presides in us forbids our departure hence without His leave. But when God Himself shall give us a just cause, as formerly to Socrates, and lately to Cato, and often to many others, certainly every man of sense would gladly exchange this darkness for that light—not that he would forcibly break from the chains that held him, but would just walk out like one discharged by a magistrate or some lawful authority, in obedience to God’s summons.”

So Cicero. Elsewhere, Lipsius (*Letters*) expresses his wonder at the 22 constancy of Arria, who not only urged her husband Ælius Paetus, a man of consular rank, to take his own life in order to avoid a more ignominious death later on, but led the way by her example; for she drove a knife into her bosom and offered it to her husband to imitate her, saying, “ It does not hurt, Paetus.” Lipsius, I say, marvels, and so do I, at the contempt of death, greater than her husband’s, thus displayed by the woman. And though,

alike by the Law of Christianity and by the Law of Nature, the man is not absolutely excusable, because such a suicide ought to have awaited the executioner's blow—if guilty, then as a punishment; if innocent, then as a kind of misfortune—still I think he deserved the pity of an honorable burial. For man ought to leave judgments of that kind to the Author of life, God, infinitely Good and Great, Whose it is to pronounce on those who have prematurely abandoned the post in life wherein they have been placed. And meanwhile the laws of humanity ought not to cease operating, and the bodies ought none the less to be committed to our common mother earth.

So much about not forbidding the erection of tombs.

Let us now turn to the other branch of our subject, the public security and sanctity of tombs. Violators of tombs were punished in Roman Law by infamy (*Dig.* 47, 12, 1), or even under the *Lex Julia* (*Dig.* 47, 12, 8), or, according to the circumstances, with heavy and capital punishment (*Dig.* 47, 12, 11). (See also Menochio, *De arbitrariis judicum quæstionibus*, ch. 38, the whole.) The jurist Paulus denies, however, that the tombs of enemies are sacred; this text (*Dig.* 47, 12, 4) seems to show that the sacredness of tombs does not depend on the Law of Nations, a proposition controverted by me just now. But the truth is, that Paulus is there describing Roman usage with regard to the tombs of enemies, and not the dictates of the Law of Nations.

Now, the question is either a special one, relating to the burial of enemies—and that question I have already discussed—or a general one, about the law relating to tombs everywhere—and by the Law of Nations a religious sanctity is undoubtedly due to them, as Grotius (passage cited) proves by much evidence of different peoples and approved writers. And even if the Romans did not treat the tombs of enemies as sacred, as regards the stone or other material of which they were made, yet they certainly were, even in the case of enemies, inviolable; for we read that the rights of burial were mutually observed between the Romans and their enemies. And this was also the settled usage of the Greeks, as the historian Thucydides tells us.

I admit, however, that enemies often offended against each other in this respect and neglected the duty of humanity. The victorious Romans did not bury the bodies of the Macedonians who were killed at Cynoscephalæ, but King Antiochus had them buried afterwards (Livy, *History*, bk. 36). And the bones of the three legions of Quintilius Varus were found in the land of the Cherusci by other Roman troops, unburied, six years after 27 Varus' defeat (Tacitus, *Annals*, bk. 1). In this connection we have the complaint of King Latinus to Turnus (Vergil, *Aeneid*, bk. 12) :

Bis magna clade victi vix urbe tuemur
 Spes Italas, recalent nostro Tyberina fluenta
 Sanguine, et ingentes campi nunc ossibus albent.

(Twice vanquished in pitched battle, we scarce guard within our city the hopes of Italy; the streams of Tiber yet run warm with our blood, and our bones whiten the boundless plain.)

This shows that the Latins who had been beaten in battle by *Aeneas* and slain went unburied. Our own age has furnished frequent instances of this. Those instances, however, are more correct which show, even in our treatment of an enemy, a common pity for the lot of man. Fierce and unbridled as Hannibal was, it is yet told of him that he gave up the bodies of the consuls Paulus *Æmilius* and Marcus Marcellus for burial, and, as Livy says, he would have done the same in the case of Caius Flaminius had he succeeded in finding his body.

It is arrogant and barbarous to use the bodies of the dead for insult and 28 vaunt of victory, as we read that the Philistines did over King Saul and his sons (*1 Samuel*, ch. 31), and as, according to Herodotus (*Polymnia*), Xerxes, King of the Persians, did when he ordered the crucifixion of the body of Leonidas, who died at Thermopylæ; but Pausanias, the victor of Platæa, when urged to retaliate on the body of Mardonius, the Persian general who was beaten and killed there, generously declined to do so, deeming such conduct only fit for barbarians (Herodotus, *Calliope*). At the present day, indeed, such brutality towards the bodies of dead enemies seems usual among the Tartars and Turks and other barbarous nations, but not among the Christian and more cultured peoples.

Now, as regards the behavior of a victor to slain enemies, it is best to 29 distinguish according as what is alleged to be incumbent on him, as an obligation of the Law of Nations is to provide burial for them, or not to forbid their burial. The former is a precept of humanity, but not of the strict Law of Nations, which does not impose on an enemy any duty of friendship towards another, whether alive or dead. We are, however, clearly taught 30 otherwise in the Gospel law, according to *St. Matthew*, ch. 5; and that is not remarkable, seeing that Christ, by his teaching and example, brought back to mankind the almost obliterated law of humaneness. For what else does that mutual love of Christians mean, except that we are to behave kindly to all, whether friend or foe? Indeed, Christ (*St. Matthew*, ch. 5, v. 44) enjoins this kindness not only towards friends, but also towards enemies; and in the verses following he gives the reason, namely, that otherwise our love would not be perfect, seeing that even men who are sinners, like tax-farmers, love their friends and hate their enemies. Now, what love is greater than that last dutiful behavior to the dead, who can not ever make any return for humane and pious attentions?

And this, unless I err, shows that the example of Alexander the Great, 31 when he ordered that Darius and his wife, who had already died in captivity, should be buried with royal honors, and the aforementioned example of Hannibal, and other examples of the Romans, are not to be imputed to the strict Law of Nations, but to moral virtue, displayed by them with a certain civil generosity, and claiming the homage of Christians in accordance with the Gospel law and the precepts of Christ. On the other hand, it is in harmony with the Law of Nations also, that no hindrance should be offered

to the burial of dead enemies. And so a request to be allowed to bury them should not be refused.

As between citizens, it is right and proper, in accordance with what has already been said, both to provide funeral rites and not forbid burial, although the former duty does not fall on every one, but only on the father or husband or other kindred, or on the heirs, and not on outsiders to the 2 same extent. Still, if the last-named do voluntarily incur any expense in providing funeral rites, an action, called *actio funeraria*, is given by Roman Law whereby they may recover the same from the heirs or other parties concerned; and indeed a priority over other creditors is given to them (*Dig.* 11, 7, 45), the wise intent of the lawmaker probably being that debts due by the deceased must be understood to be subject to deduction of the amount due under the Common Law of humanity for funeral expenses, seeing that public compassion for the lot of man, and necessity and expediency, drown the voices of those who would plead in bar thereof a contract or pact, or other private agreement.

Let this short treatment suffice for this topic.

CHAPTER XVI.

Of War in general and its Requisites.

SUMMARY.

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| <ol style="list-style-type: none">1. Description of war according to Cicero and Grotius.2, 3. Private war is not war properly so called.4. A really mixed war can not occur.5, 13-15, 25, 26. Neither civil war nor a non-solemn public war are true wars of the Law of Nations.6. Definitions of true war.7. Use of magic and of poison against an enemy not allowed.8, 9. In war a just cause, public authority, and due proclamation are required.10. The right intent of a war is presumed from a just cause.11, 12. How far this is necessary by the Law of Nations or in the forum of conscience.16-19. Answer to Grotius' arguments in favor of a non-solemn public war. | <ol style="list-style-type: none">20, 21. In what cases war may be called permissible without sovereign authority.22. These cases brought within the limits of the rule.23, 24. Subjects may not resort to arms on a pretext of denial or delay of justice.27. A war between members of a confederation, following a rupture of the alliance, is not a civil war, but a war properly so called.28. Otherwise as to a war between Kings or Princes who are at the head of administrative districts of one and the same Empire.29-31. What if the division into these districts be perpetual?32. The connection between the cause of war and the mode of proclaiming it.33. The distinction between defensive and offensive wars. |
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War is described by Grotius (*De jure belli ac pacis*, bk. I, ch. I, § 2) as I "the condition of those who as such are forcibly contending with each other." Now, in this description Grotius differs a little from Cicero, who speaks of war as an armed struggle; and in so far as Grotius generalizes, not the act of strife, but the condition of striving, he is more correct. Nevertheless the two descriptions aim in reality at the same thing, namely, that when men are either in the condition or in the act of doing violence to each other, they are at war and that same condition of mutual offense is war.

Here, however, a somewhat too wide signification is given to war; for it includes those kinds of violent struggle, such as private wars, which can only be called war improperly. For although Grotius (§ 2) treats this as sharing the nature of public war, yet, when the circumstances are weighed, the contrary proves to be the sounder view. My reasons are: (1) Private persons are not, as a rule, allowed to wage war; and therefore private war is inadmissible as war. (2) Although, in certain cases (which I propose to consider below), private persons are allowed to fight, yet that right retains the character of simple defense, a topic already dealt with by me, or else it reposes on the authority of Public Law or concession, like the olden tilting on horseback which was called a tournament and the single combat with an enemy challeng-

ger. Such as these must not, however, be in any way described as kinds of war properly so called, which originates in the secondary Law of Nations. We therefore, with one stroke, rule single combats, duels, and all private fighting out of the scope of true war. (Add Dominus Felbinger, *Disputatio de bello*,

3 th. 19.) (3) A third and especial reason is, that this kind of fighting has not the true effects which pertain to war by the Law of Nations, such as captivities, ransoms, postliminy, etc., with which I shall be concerned later. What, then, will be the good of considering private war as a distinct variety of war, if this leads to no subsequent results?

4 And consequently no concession can be made with regard to a mixed war, one, that is, which is partly public and partly private; on which see Grotius, bk. 1, ch. 3, § 1. For if the simple variety of private war is inadmissible as true war, so also is a mixed war, owing to the deficiencies of that simple variety, out of the union of which with public war it is supposed to spring. If, then, what they call a mixed war is true war, it is public war only. (See Ziegler, *Annotations to Grotius*, place named.) In this connection, too, belongs Ulpian's response given in *Dig.* 49, 15, 24, where he requires, for the production of the effects of true war, that there shall be enemies (*hostes*) on either side; so that where, as in a mixed war, there are not true enemies on one side, it can not be taken as a true war properly so called.

5 I think, moreover, that a civil war and a non-solemnit public war (that is, one which some say may be duly proclaimed by a magistrate) must be marked off from the nature of true war; this point will appear more clearly after we have considered the definition and requisites of a just and true war.

6 From these premises, then, we may give a fuller definition of war as a condition of lawful hostile offense existing for just cause between royal or quasi-royal powers, declared by public authority. I call it "a state of lawful hostile offense" because it is permissible to hurt the enemy not only by armed strife, but also by stratagems or even by frauds, according to the well-known

Dolus an virtus, quis in hoste requirat?

(Fraud or valor: who worries which of the two is employed against an enemy?),

provided only that these hostile measures do not contravene the Divine Law or natural probity.

7 Hence, to use magic in fighting or to kill an enemy by corrupting his men to poison him, is wrong. And here we have the praiseworthy example of the old-time valor of the Romans in connection with King Pyrrhus: he had an unconquered army in Italy; yet the Romans would not allow his death by poison to be compassed by one who offered himself for that purpose, but they sent the wretch to Pyrrhus.

8 I added in my definition "for good cause," since it is not permissible to begin a war without a just cause, as will hereafter appear. Then I went on, "between royal or quasi-royal powers," for war-making belongs to Kings or those having like power and not to private persons. Lastly, there follow the

words "declared by public authority," for war requires a duly accomplished declaration and arises in a sense from consent, the one side declaring and the other accepting war. Whether this acceptance be publicly made, as by the Carthaginians in the Second Punic War, or tacitly—that is to say, by the other side's refusal to give satisfaction in the causes and grievances which led to the war, as was imputed to the Athenians in the Peloponnesian War—does not much matter in this particular; for he who does not remove the causes of war, or who does not allow the grievances to be compromised on amicable principles, agrees of course to that condition of hostility which is, as it were, the last resort in settling the disputes of Kings and peoples.

From this, it is not hard to collect what are the requisites of war ⁹ properly so called. They are three: (1) The royal or quasi-royal power of the belligerents, (2) The justice of the cause, and (3) The proclamation by public authority. This third requisite of war is omitted by Thomas Aquinas (*Secunda Secundæ*, qu. 40, art. 1); and in its place he substitutes another, namely, the right intent of those who are at war, this intent being either to further some good or to avoid some ill. This requisite, however, ¹⁰ though sound in itself, is already included in the second, that is, in a just cause of war; for he who has such a cause is presumed to mean to avoid those grievances to the non-redress of which by the other side, upon his demand, the war is due; and further he means, in consequence, to advance some good and lawful gain to himself, namely, that an equal peace which is unobtainable otherwise shall be obtained by war and arms. The justice of the cause of war, therefore, impliedly involves the right intent of the belligerent.

Some one may urge that sometimes a belligerent has a just cause of war ¹¹ but would not have been driven into war by it had he not been roused by hate or anger, and therefore that the justice of the cause can be distinguished from the right intent of the belligerent. My reply is, that this operates in the forum of conscience only, this being perhaps what Thomas Aquinas had in contemplation, but that it does not operate as regards the External Law of Nations. For just as private persons can exact payment of a real debt out of hatred to the debtor, without which hatred they would not have been so rigidly insistent, and so far as they act unjustly herein it is not as regards the ¹² external forum, seeing that they but claim what is their own, but only as regards God and in the forum of conscience, so, by the External Law of Nations, Kings and powers may assert their own claims and, if these are not met, may declare war on a just cause, even though hate and anger conspire to urge them to this course; and, however faulty these motives may be in conscience, yet this does not make the war unjust under the Law of Nations.

Further, as regards that prime requisite of sovereign power or some ¹³ power analogous to sovereignty, it is easy to see that not every war which is called public is, speaking accurately, true war. This holds especially of a public non-solemn war, which Grotius (ch. 3, § 1) considers may be waged in right of a magistracy; but I, with Ziegler (*Annotations* on same passage),

hold that this kind of war must be excluded. And I think that Grotius himself furnishes no slight argument in favor of my view, ch. 3, § 4, where he says "it is provided in the Law of nearly every people that war is not to be waged save on the initiation of him who has the supreme power in the State." And a little later (§ 5) he adduces among others the example of Cnæus Manlius, who was rightly accused by his legates for making war on the Gallo-Græci without the authority of the Roman people.

14 If this be so, and so it is consistently with the Law of Nations, I do not, indeed, see how Grotius can still defend this as public war and as being by the Law of Nations competent to a magistrate. For if all or nearly all nations adopt the rule that a war which is waged on the authority of a mere magistrate is not reckoned true war, such a war will not be true war by the Law of Nations, especially seeing that, by the Law of Nations, that only is just and true war which is undertaken on the initiation of him or them to whom the right of war belongs under the laws and customs of his or their State. For instance, war between Germans and French is not just and true war unless waged in the name and under the auspices of those who have the power of war in Germany and in France, that is, in the name of the Emperor and the Estates of the Empire and also in the name of the King of the French; and so in similar cases. If, then, this is almost the universal rule, it is apparent that peoples think it proper that the right of war should be vested in no other hands than those of a King or Prince or other sovereign authority. Therefore, by the Law of Nations that can not be admitted as a public war which is waged by a magistrate alone and merely under his auspices.

16 And there is accordingly no force in the considerations urged by Grotius to the contrary (place named). For in the first place, although, as he himself says, magistrates may defend their jurisdiction by force and arms, yet this does not necessarily carry with it a right of war against foreigners, but rather the right to coerce rebellious subjects by bringing them back to obedience by force. Still, this employment of armed force against subjects will not be true war. Thus, in our own day the viceroy of Naples resorted to force against Messina; but this was not true war, the other side not being true enemies, but subjects. It will be the same in similar cases. If, however, true enemies be joined with the rebel subjects or citizens, as Mithridates, King of Pontus, was in olden time to Sertorius and as our Germans were to Classicus and Civilis, the Roman generals, or as in recent times the French were to the people of Messina, the war which is truly such by the Law of Nations is not that with the subjects or citizens, but that with the conjoined enemy.

17 It will be safer and better for governors and prefects who are apprehensive of an armed outbreak, and have still an opportunity to do so, to refer the matter to their King or Prince before entering on the hazard of a conflict. It is quite clear that by Roman Law no one was to resort to arms without the approval of the Emperor. This was by a constitution of Valentinian in *Cod. 11, 47, 1*; and there is nothing inconsistent in the assertion that this rule also holds in the Law of Nations.

The instances adduced by Grotius on the other side are not relevant; for, 18 as regards a last will which by the Civil Law is, in one form, namely, that of a testament, just and perfect, and in another form, namely, that of a codicil, is imperfect, the distinction is in itself well-founded, but still it is inapt to support or illustrate the division of public war into just (or solemn) and non-solemn, if the distinction indeed exists. Yet this is what Grotius proposes, not only in respect of the less degree of solemnity which is found in codicils as contrasted with testaments, but also in respect of the efficient cause, there being on Grotius' hypothesis one kind of power which can make a solemn war, namely, the sovereign or royal power, and another inferior kind of power, namely, the magisterial power, which can declare a public non-solemn war. The parallel with testaments and codicils is, however, inexact; for he who can make codicils can also make a testament, and *vice versa*.

Again, there is no more aptness in the example of the conjugal union 19 (*contubernium*) of slaves as compared with the marriage of free persons, as if the former corresponded to a non-solemn war and the latter to a solemn war. For in the Civil Law *contubernium* clearly does not deserve the name of marriage, and so that Law can not be invoked on the principle of analogy to support a division of public war into solemn and non-solemn; but of course if Grotius means the Law of Nature or the Canon Law to apply to this example, the unions of slaves are there reckoned, in virtue of their obligation or their solemnities, to be lawful marriage no less than the unions of free persons. (See the titles in X. 4, 9.) So we do not obtain from this quarter any light on the division of public war into solemn and non-solemn varieties. It is indeed obvious, and Grotius himself admits, that these differ from one another very much, especially in their effects; and, whatever examples of these kinds may show as a rule, they do not prove the aforementioned doctrine of Grotius. This doctrine could indeed more easily be conceded if it were founded only on the more or less solemn nature of the formula for declaring war, and not on the different powers at the back of the different wars.

Cases are, however, enumerated in which the right of war certainly 20 appears to belong to other powers. (1) When subordinates have it by lawful usage or by privilege. So Molina holds (disputation *De justitia et jure* 100, n. 11). (2) Where a King or Prince infringes the fundamental laws of his kingdom or principality, under which he comes to the throne. This was what, in the preceding century, the confederate Estates of Belgium made matter of complaint against King Philip II of Spain, as I have said above, following Van Metteren. But this, because of the great risk which it 21 sets up, can not be admitted at all, or only on evident and most pressing grounds; otherwise empires would be subverted on various pretexts. (3) When a King or sovereign Prince has not administered justice; for then, in order to redress the wrong, inferiors have a right of war, according to Molina (place named, n. 12). (4) To these the case may be added where a Prince or people is in quasi-possession of sovereign power, especially where he or it

has not yet acquired plenary right to the same by prescription or in some other way. Arguments can be founded on the considerations set forth above concerning sovereign power. Lastly, (5) you will at first sight think that those authorities must be included here which possess a right analogous to sovereignty, or of a subordinate character, like Princes of the Empire, although the sanctions of public peace as a rule forbid them the exercise of offensive war with one another.

22 These cases, however, and any others like them, may not inaptly be brought within the limits of the general rule. I have hitherto denied that magistrates have the right of making war; but, where a right of war comes from grant or the privileged indulgence of sovereign authority, or where long-standing usage or observance, which implies a tacit grant, is the source of such a right, or where a breach of fundamental laws on the part of the King has annulled the right to reign and has tacitly restored it to the Estates, also where there is a quasi-possession of supreme power or a right analogous to sovereignty—in all these cases what we have is not a war waged in mere right of a magistracy, and much less one referable to private authority; and it is not remarkable if, other things being equal, a war declared by such public powers as these is to be considered a true war under the Law of Nations.

23 The only difficulty is presented by the third case. According to its terms, the right of war is attributed without any grant or any quality or character of sovereignty to subordinate private persons. I have very grave doubts, however, about this third case; for, even granted that a denial or refusal of justice entitles inferiors to use force in order to assert their own rights (and that this should be so is not to be commended because of the danger to the State), still that force would not have the nature of true war, for it would lack the true effects of war in rendering the capture and killing of an enemy permissible, seeing that at the outside the violence in question is only competent in order to obtain one's due by arms, and this because of the defective justice of the sovereign Prince. If, however, we were to adopt

24 Molina's view entirely, that in such a case a true war is set going, still it might be retorted that there was at any rate a tacit grant of a right of war, for in the fact that a King or absolute Prince does not administer justice to his subjects, it would seem, according to the hypothesis, that he makes them a tacit grant of power to make war; but, as I personally should not admit the lawfulness of this use of force by subjects among themselves and should not consider it a true war, I have no need of such a retort.

25 From this it follows that, even in the cases just enumerated, which Molina and others would treat as exceptional, neither magistrates as such nor subjects as such can declare a war properly so called; but, so far as an image of sovereign power resides in them in some sort, in virtue of which a magistrate may exercise a right of the King, and subjects the right of a free people, they may in that case effect a change of their ordinary condition. So it is now clear that the distinction in wars according as they are waged by sovereign

authority or by a magistrate, the former being called public and solemn but the latter non-solem, falls to the ground utterly, it not being admissible in strict speech to speak about a war by right of a magistracy, as I have already shown. For the same reasons, we also reject civil war by the Law of Nations, although it may seem that public authority is called into activity in a war of this kind, as when in olden days Marius entered into a fatal strife of arms with Sylla, Julius Cæsar with Pompey, Augustus with Antony, Otho with Vitellius and Vespasian and other Princes thereafter. Yet in fact it is otherwise, because in such a case the State is ordinarily split into parties and factions, and as there is no right of sovereignty in the antagonists, individually considered, such as there is in an undivided State, so the armed struggle of citizens is not to be considered true war by the Law of Nations. Accordingly, Lucan neatly calls the civil war between Cæsar and Pompey a "common evil," where he says "the struggle engaged all the strength of the distracted world, to the common evil," etc. And from this standpoint Ulpian (*Dig.* 49, 15, 21, 1) denies that in civil war there are any rights of captivity and postliminy. Grotius was of the same opinion (*De jure belli ac pacis*, bk. 3, ch. 6, § 27). As the excellent Felbinger (dissertation *De bello*, th. 16) has asserted, the division of war into external and civil is a division of the equivocal into the equivocal, and civil war is not properly war at all.

Now, the question is raised whether a war between confederated States, involving a breach of the alliance, is or is not to be called civil war. I think it is true war, because it is waged on both sides under the auspices of different States and with sovereign power. But I should take the opposite view of a war between Kings or Princes who administer different regions of one and the same Empire. And so I think that the war between Sextus Pompeius, commanding in Sicily, and Augustus, and the war between the Emperor Constantine and Licinius (to whom the Roman Empire in the East had come, under an agreement), were civil wars, for the unity of the Empire prevented the territorial division of administration among Princes from conferring on them a right of making true war on each other.

This applies where there has been a temporary division of the supreme administration, but I do not apply the same rule to the case where an Empire has been completely and perpetually divided into several principalities or kingdoms, whether the division be the result of agreement or of a testamentary disposition, if this be permissible according to the nature of the Empire (on which point see above). It is accordingly indubitable that Charlemagne, the Emperor of the now severed West, could make true war on the Greek Emperors of the East. And I affirm the same of Lothar, Louis, and Charles, the sons of the Emperor Louis the Pious, namely, that they could have waged war on each other, in virtue of the division of the power of the Franks into the three distinct kingdoms of Italy, Germany, and France.

Nevertheless, in this matter we ought to distinguish clearly this right of making a perpetual division into kingdoms and principalities from a merely

- administrative division, however long observed by a series of successors. For example, when the Roman Empire was divided between Arcadius and Honorius, the sons of the Emperor Theodosius I, the East falling to Arcadius and the West to Honorius, and this division of the Empire endured under the successors of each of them, I should be inclined to say that any wars that arose between them could only be called civil. Such a war broke out first between Constans and Constantine, the sons of Constantine the Great, after the Empire had been equally divided; for, although those Emperors, in point of fact, ruled separate parts of the Empire, they had not done away with its real unity, seeing that by their common and undivided authority they enacted laws that were to hold good through East and West alike, a thing that does not occur in kingdoms which are permanently divided or separated. If, therefore, this same condition of things lasted under their successors, the unity of the Empire would always be preserved and the same principles would consequently remain in operation as regards war. This is confirmed by the consideration that, in virtue of this undivided legislative power in respect of the whole Empire, the citizens also were deemed to be such in the East and in the West, without distinction as to the part of the Empire, and so a war between them could not be anything but a civil war.
- 32 Quitting this topic, we must now speak of just causes of war, which is our second principal requisite. But as this is a matter which calls for rather detailed treatment, I have decided to reserve it for the following chapter and, because of the connection between the topics, to deal at the same time with the formalities of declaring war (*clarigatio*). For if redress be not made, either voluntarily or on friendly principles, to one who has just cause for making war, a declaration of war ordinarily follows, as is clear from ancient history and from the conduct of Kings and peoples in more modern times.
- 33 For the rest, there is a better division of wars than the foregoing, and one which is more acceptable, the division, namely, into offensive and defensive wars, by reference to their final cause. For as it is lawful for just cause to defend oneself by arms in one kind of war—thus the legates of the Athenians, when appealing in the Spartan Senate for a reference to arbitration, protested in the name of their State that if Potidæa was not left to them they would adopt strenuous measures of hostility, because the Spartans would be acting against the terms of the treaty (see Thucydides, *Peloponnesian War*, bk. 1)—so also it is lawful to commence an attack, or take the field first, against another King or people—and this is the kind of offensive war which Hannibal, in his speech to his troops in Livy (*History*, bk. 21), declared that he had been making on the Romans and Italy, saying, “we brought war, and swooped with hostile ensigns down on Italy, all the bolder and keener for battle in proportion as an assailant has greater hope and higher courage than one who is on the defensive.” Of these varieties of war, the defensive and the offensive, examples are everywhere at hand; meanwhile, let this suffice for the task of the present chapter.

CHAPTER XVII.

Of Just Causes of War and the Formalities of Declaration of War.

SUMMARY.

1. Two necessities to render a cause of war just.
 2. The Reason of war (*ratio belli*) without reference to justice and equity reprobated.
 3. The justice of war disappears when friendly redress is offered.
 4. The distinction of offensive war according to its end.
 - 5, 6. Some of the causes of war are justificatory, others persuasive.
 - 7, 8. A cause of war which is justificatory in the intention of the war-maker must not be confused with a truly just cause.
 9. How the causes of war according to Grotius are arrived at.
 10. The cause of war to be referred to some injury either to person, to reputation, or to property.
 11. There is a just cause of war whether it be by the King or by the State or by subjects that wrong is done to the other side.
 12. A grievous wrong to King or State affords a just cause of war.
 13. The cause of war arising in a wrong to property has the widest scope.
 14. Seven causes of offensive war enumerated by Molina, but they can be reduced to the foregoing.
 - 15-20. Solution of the question whether it be lawful to declare war for a doubtful cause.
 - 21-27. Whether there can be a just cause of war on both sides.
 28. Three kinds of justificatory causes of war.
 29. Advisable to settle the quarrels of Kings and peoples otherwise than by arms.
 - 30, 31. Whether a war with Mahometans or pagans because of their inferior religion is a just one.
 - 32-36. Whether the refusal of passage over a kingdom or province is a just cause of war.
 - 37-40. Subject to four pre-conditions, passage can not be refused to a power which is about to make war on a third.
 41. The instance of Sihon, King of the Amorites, refusing the Children of Israel passage into the Land of Canaan.
 - 42-44. Whether a war against Turks or Saracens because of their detention of the Holy Land is a just one.
 45. The claim to universal empire or other different pretexts not a just cause of war.
 - 46-48. Whether, and how far, a defensive war needs a just cause.
 49. Public declaration of war necessary; this used to be made in days of old by legates and facials.
 - 50-52. How declaration of war is made in the present usage of nations.
 53. Declaration of war is of two kinds, unconditional and conditional (*Grotius' clarificatio*).
 54. A declaration of war made to the principal enemy is extended accessorialy to his allies.
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For the justice of a cause of war, of which mention was made in the preceding chapter, there are in general two requisites: (1) A serious grievance, suffered by the party making the war; (2) A refusal of redress by the other side. For recourse must not be had to war on any promiscuous ground or for a slight hurt. This is because of the greater evils which thence arise, and which are such that it is taken to be the intent of nations that the consideration of lesser injuries should be deferred to a time when a more convenient opportunity for redress or claim presents itself, rather than that the last remedy of arms should forthwith be invoked. He, then, who is not really hurt, or only moderately, has no just cause of war.

2 Certainly the (wrongly so-called) Reason of war (*ratio belli*) is utterly abhorrent to every Law of Nations. According to it, some have persuaded themselves that everything is permissible which is demanded for military success, despite all considerations of equity. They so perversely forsake the Law of Nations that they do not measure the justice of a war by reference to its cause, but make the good pleasure of the belligerent the test of the remedies employed. Hence comes that abominable monster "*raison de guerre.*" It is not unlike the Natural Law of Brennus, King of the Gauls in times long past: when he was asked by the Roman ambassadors why he was besieging Clusium, he replied that he was "doing it by Natural Law, in order to prevent the strong from being compelled to give way to the stronger." That is how Claudius Cantiuncula tells the story in the prefatory letter to his *Paraphrases Institutionum*; and it appears in slightly different form in Livy (*History*, bk. 5). Indeed, devastations of friendly or neutral territory, raids, lootings, quarterings, contributions, and whatever excesses against human and Divine justice and equity are committed by armed wickedness, all these are for the most part due to this foul heresy.

3 Further, whatever be the grievance, if the party causing it offers redress by amicable methods or adds security against any delay on his part to make a voluntary satisfaction, the justice of the cause of war disappears. It must, however, be noted that a grievance can be redressed in two ways, either specifically or by an equivalent. For sometimes the situation remains quite unchanged, and restitution of the identical thing is then enough, as, for instance, when property has been seized and the party seizing it is ready to restore it, together with its fruits and a sum covering the incidental losses. And at other times the situation is no longer what it was, and then restitution of an equivalent suffices. This may take different shapes in different cases; thus, if the circumstances admit, it may be a pecuniary compensation, or it may be a penal award against the authors of the wrong or a surrender of them for punishment. In this connection we have the remark of St. Augustine in c. 2, C. 23, qu. 2, where he says, "a just war is defined as one which avenges a wrong, as where the people or State against whom war is to be made have neglected to redress a wrong done by their men, or to restore what has been wrongly taken away."

4 Accordingly, offensive war used to be distinguished into one variety which is waged in order to avenge a wrong done, and another variety which is waged in order to recover some of our property or something that is due to us, when these are withheld by invincible ignorance and we can not obtain them in any other way. (See Molina, *De justitia et jure*, vol. 1, tract. 2, disp. 102, nn. 4, 5.) It is, however, essential that, in an offensive war waged for purposes of recovery, there should be this invincible ignorance on the part of the enemy, because if either the enemy knows of the improper detention of the property or his ignorance of the matter could have been overcome, an offensive war for the purpose of vengeance is permissible, and not only for

the purpose of recovery of our property if we have lost any—as Molina in effect holds (place named)—or for the acquisition of the same if it was not ours before. Examples of such variety of offensive war can be met with on all sides. Thus, the Romans demanded that the Carthaginians should surrender Hannibal and his associates to them because of the destruction of Saguntum; and in consequence a war of vengeance was declared. The Greeks were more moderate; and, as Dictys Cretensis writes, they only claimed Helen and the property that had been seized, and not Paris, the adulterer. Now, what is done can not of course be undone; and in that class of case where there is a natural impossibility of restitution, the only redress that is possible is redress by way of equivalent.

In order to present the argument of this chapter more concisely, I think 5 that I ought first of all to examine the different causes of war; on this see Polybius (*History*, bk. 3) and, following him, Grotius (*De jure belli ac pacis*, bk. 2, ch. 1, § 1, and ch. 22, § 1). One class of the causes of war is and may be called justificatory, another persuasive: the former, as the name shows, are those which make a war just, and this either truly just and in accordance with the Law of Nations, or at any rate just in the intent of the war-maker; while the latter lead to the taking-up of arms on principles of expediency. Polybius calls the former *προφάσεις*, pretexts, and the latter *αιτίας*, causes. And in very truth, what is too often put forward in public is but a pretext of war, the true impelling cause of war being something different. Different examples of these things are given by Grotius (bk. 2, ch. 22, § 1). And if, at the present day, we would genuinely gauge the cause of a war, we shall too often find one given out publicly, while another is the impelling motive of the war.

Consistently herewith, then, Polybius understands by the word *πρόφασις* 6 that which is bandied about, in outside speech and writing, as the cause of the war; but by *αιτία*, that which is the true cause, whether by the Law of Nations it be just and sufficient to cause the war or not. I hold, then, that in drawing this distinction Polybius is considering the causes of war so far as they are actually found among belligerent Kings or States. And the same judgment must be pronounced in the case of Ælian, bk. 12, ch. 53, where he speaks about ἀρχὰς πολέμων, the beginnings of wars, and in the case of Diodorus Siculus, bk. 14, where, when speaking of the war between Lacedæmon and Elis, he conjoins the words *προφάσεις* and *ἀρχάς*. These writers always pay regard to the causes and external pretexts which they are about to prefix to the wars which they recount, although there are sometimes other causes lurking in the breasts of the responsible authors of the war, such as the lust of glory, fear of a neighbor's power, hatred, and the like, which may have given rise to the war; accordingly, *ἀρχή* and *πρόφασις* are not always and necessarily opposed one to the other, though they differ at times when one thing is given out as the cause but another truer cause lies hid.

7 However this may be, from the standpoint of the Law of Nations neither the cause that is given out nor any other secret cause is sufficient for the commencement of a war unless it be in itself adequately relevant and just. Accordingly, we ought not to confuse with causes just in themselves the *justificatory causes of war*—a phrase which Grotius (above-named ch. 1, § 1) employs in this connection, in contrast with what I call *persuasive causes*—because both a tacit and an express cause of war which, in the opinion of the war-maker, is weighty enough may, in actual fact, be insufficient to support a war. It seems clear to me that, in the aforementioned passage of Grotius, there is a certain confusion between what, according to the aforesigned writers, are often put out as causes of war, whether externally or secretly, 8 and true causes under the Law of Nations; for Polybius and Diodorus Siculus distinguish those causes, not so much from the standpoint of justice truly so considered under the Law of Nations, as by reference (as I mentioned) to the acts and deeds of war-makers, who have a way of not infrequently feigning one cause while they have a different cause in reality. What we are here concerned with, however, is the causes of war which are in themselves true and sufficient, without paying any attention to the mere opinions of the war-makers.

9 Again, these causes may be looked at in two ways, either as regards the assailant or as regards the party who is on the defensive. We speak here of the former; yet hereafter we shall have to consider what rights obtain on the side of the latter. Grotius (place named, ch. 1, § 2) reduces the sources or causes of wars to the sources of forensic actions, and accordingly distinguishes them into causes based on a wrong not yet done (that is to say, threatened; and we propose to secure ourselves against its happening) or on a wrong actually done; and in the same place he gives illustrations drawn from the Common Law.

I do not propose to discuss here the question whether the word “*wrong*” (*injuria*) is properly employed or no. As regards the substance of the matter, Grotius declares his opinion at the end of § 2 that a wrong not yet done affects either the body or property; and here we notice that reputation has been omitted, which otherwise is on the same footing as life. Why is this? Because it was assumed that security for avoiding disgrace in the future, though refused when claimed, could not furnish a just cause for making war. It is clear that what Grotius (place named) pronounces to be just causes of war on the ground of a wrong not yet done but threatened, really relate to a defensive war, as is shown in the same place (from § 3).

10 We will, however, first enquire into the varieties of just causes of an offensive war, as being the order of what comes first in nature. These causes, then, are in general threefold: injuries to the body, to the reputation, and to property. An injury is done to the body either by wrongful wounding, or by killing, or by imprisonment. And so the Emperor Frederick III began a just war against the chiefs of Flanders on account of the captivity of his son

Maximilian. All the cases named, however, presuppose a wrongful hurt; so, if any one is lawfully imprisoned, or if, in the interests of the public, the reputation of any one is defamed because of notorious crime, no just cause of war is given to the party in question. For, were that allowed, no private person would be able to bring an action or accusation against another. It is perhaps on this principle that the question of the justice of the war waged by Philip II of Spain on Queen Elizabeth of England can be settled.

Now, I employ these words in the widest sense; so that, whether the bodily hurt be done to King or to ministers or to subjects, whether of a King or of a republic, and it be a notable hurt and such as renders arms morally just, war may follow in default of redress. In this class may be put the deed of the Gibeonites who outraged the wife of the wayfaring Levite so that she died (*Judges*, ch. 19); and when the Benjamites would not deliver the doers of the crime up to punishment, the rest of the tribes of Israel made just war on them.

In like manner, a gross outrage or insult done to a King or State, whereby loss of reputation is caused, affords just cause of war; for Kings and States are concerned not to suffer public disgrace without taking lawful vengeance, and not to allow their majesty to be affronted. For this reason David, in the Bible, made war on Hanun, King of the Ammonites, because he had in scorn ordered the shaving of one half of the beard of each of the ambassadors sent by David and the cutting of their garments. And the Emperor Frederick Barbarossa made a fatal war on the people of Milan because they had scornfully mocked the Empress his wife. So also Ibrahim, the Turkish Sultan, made huge preparations for war because of the capture of his wife the Sultana by the people of Malta, although their act could not be convicted of injustice because of the perpetual hostilities with the Turks. In this connection, too, mention may be made of the war of Cyrus against Astyages, waged in revenge for his exposure when a child, and in like manner the war of Romulus and Remus against Amulius, and that of Tamerlane the Scythian against the Turkish Emperor Bajazet, all of which are known from histories. Of course, the affront or outrage must be public in order that there may be scope for armed vengeance; and there is nothing inconsistent herewith in my remark about ministers and subjects, for they also can suffer or be injuriously affected on public grounds.

The farthest-reaching cause of war is that on account of injury to property; for whenever the rights either of Kings or of peoples are violated or their goods are carried off or spoilt, provided the loss be more than moderate in amount and friendly redress can not be obtained, it will be lawful for the Kings or peoples to follow up their rights.

This threefold wrong to body or reputation or property can easily be made to include the other causes which, by the Law of Nations are sufficient for an offensive war; Molina, indeed, enumerates seven kinds of these (afore-named tract. 2, disp. 104, the whole), namely, rights in a kingdom usurped

by another, rebellion, public contumely, aid to enemies, defense afforded to criminals, violation of a treaty or an agreement, and refusal of approach or of passage, or of other things which are permitted by the Law of Nations. But all these can without any straining be brought under the three aforesigned classes: thus, under the class of injuries to property may be brought the usurpation of a kingdom, rebellion (although this does not involve subjects in a war properly so called), violation of a treaty, and refusal of things allowed by the Law of Nations (with the exception of passage over foreign territory, of which shortly); under the class of injury to reputation, public contumely; while the sheltering of criminals and the rendering of aid to an enemy may be brought under wrongs either to the persons or to the property of the other side.

15 These points being premised, other more special details relating to the causes of war we will despatch by means of questions. (1) The justice of a cause is often ambiguous: a question arises whether war may be begun on a cause which is probable in itself, but in point of fact is doubtful. I pass over the more general question whether it is lawful to make war, as being with sufficient clearness answerable in the affirmative whenever there is a concurrence of just cause and the other conditions and requisites of a war; this is amply discussed by Grotius (*De jure belli ac pacis*, bk. 1, the whole of ch. 2, where he answers objections to the contrary), and also at large by Molina (the whole of disp. 99).

But a solution of the question before us requires, I think, that a distinction be drawn between an offensive war undertaken for revenge and one undertaken for the acquisition or recovery of property. An offensive war of vengeance can never, I think, be lawful for a doubtful cause, because this kind of war tends to be in effect penal; now a punishment can never be inflicted for a cause which is really doubtful, and so, by analogical reasoning, it will not be lawful to set a war going for such a cause.

16 In an offensive war for property, a further distinction must, I submit, be drawn; for the party against whom war is being made is either in possession or not in possession of the thing in dispute. In the former case, an offensive war is again unjust because the possessor is equal to the claimants in the merits of a doubtful case, and superior to him in the advantage of possession; and so he does wrong who in an equal principal case proposes to deprive him by armed force of his possession. This goes so far, according to the opinion of Molina (aforenamed tract. 2, disp. 103, n. 8), that it even applies in a case where the balance of probability is in favor of the claimant—and this without any such division of the property between the claimant and the possessor as some have asserted ought to be made in such a case, in proportion to the greater probability of their causes—because, as Molina says (place named) “it was never heard that a judge, not being an arbiter, ruled that a *bona fide* possessor of a thing should divide it with his opponent in proportion to the amount of doubt on his title”; and hence the same writer

deduces that "it would be unjust that the opponent, if in that event he went to war, should also be bound to make good all the losses which he inflicted in that war." But I can not assent to this assertion unqualifiedly; for what if the claimant King (or State) has so much the greater probability on his side that it almost amounts to full proof—would it not in such a case be just and equitable that he (or it) should succeed in his claim and obtain something from the opponent, in view of the high probability of his cause? For even in judicial process the claimant might in that event obtain something against the possessor, at any rate by means of the suppletory oath.

Accordingly, in the controversies of Kings and peoples with one another,¹⁸ if the claimant side has so good a cause that he may with probable justice win, then, since he has no means of submitting the matter to a judge or arbiter and can obtain no satisfaction in any other way from the possessor, but his application to refer the question of satisfaction to the arbitrament of a good and wise man is refused, and the matter in hand being presupposed to be of great moment, I think that they are not wrong who declare for the lawfulness of an offensive war. But if this quality and high degree of probability be¹⁹ not present in the case, I agree with Molina, for reasons already set out; nay, unless that degree of probability is openly apparent in the claimant's case, I think it better, because of our hatred of war, to say that war is not permissible. If, however, neither of the disputants is in possession of the thing, or the merits of the possession are similarly in doubt, as is the principal cause, then the thing ought to be divided between them, and a just war may be waged against him who declines the division (Molina, place named, n. 11), the reason being that in that equality of cause and of possession he does the other a wrong by not admitting him to a share in the thing. But as to Molina's declaration in the same place with regard to a *mala fide* possessor, and his proposal that division should also be adopted in his case, I certainly do not approve of this save where, as I have said, there is an equality in the possession; for otherwise, although one has only a *mala fide* possession, he²⁰ can not be compelled to transfer that possession to, or share it with, one who has not shown any better right as regards the thing itself (by inference from *Cod. 3, 32, 28*), and therefore war can not on that count be set going against him.

For the rest, it easily appears from the foregoing what must be held with regard to a pecuniary claim of great magnitude but doubtful correctness. For just as execution does not issue save with regard to a liquid debt, so also there can be no declaration of war. If, however, the preponderating balance of the case be on the side of the claimant, the same results hold as have just been set forth with regard to the same probability in the case of a controverted ownership.

(2) My second principal question is, Whether a war can be just on both²¹ sides. Molina (passage last cited) answers that it can, adding, however, that it can not be just on both sides at the same time both formally and materially,

but on one side it must in such a case be just formally only. What he means is in effect this, that as regards the cause in itself a war can not be just on both sides (this is to consider the justice of the cause materially), but that it well may as regards the just belief of the belligerents in a doubtful case (this is to consider the justice of the war formally).

22 It is clear, then, that our requirement of a just cause of war must not be taken as applying to both sides as regards that justice materially considered. Nay, it is impossible that such a requirement could be satisfied; for if the author of the war has a cause therefor which is just in itself, it follows that the attacked party can not also have a cause which in itself and absolutely speaking is just, and *vice versa*, for belligerents are opposed to one another, one affirming and the other denying the justice of the cause of war. This is what the Archdeacon says on c. 2, C. 23, qu. 2: "there is only one lawful cause of war, namely, the contumacy of one who unjustly resists the claim of another; for war may then only be lawfully made when justice can be obtained in no other way from him who is liable to the claim." Here the Archdeacon is speaking very generally about the cause of war, for it is clear from the premises that other more special causes may be assigned. But all these special causes involve, as a general condition and requisite *sine qua non*, contumacy on the part of some one who is unlawfully resisting a claim; and this contumacy, in its turn, involves the double condition named, to wit, a wrong done and persistence in refusal of redress, matters spoken of at the beginning of this chapter.

23 So then, to return whence I set out, a war materially just on both sides is impossible, but different considerations apply to formal justice because of the obscurity which may be in the circumstances; for not infrequently the merits and justice of a case are found to be so complicated and involved that there may well be on both sides a belief in the justice of their cause. (See Grotius, *De jure belli ac pacis*, bk. 2, ch. 27, last section.) But here a new difficulty emerges, and that is whether, at any rate for a true war, there ought not to be true justice on the side beginning the war or whether this is

24 immaterial, provided it be found on the side of the defendant. I see that Molina (aforenamed disp. 103, n. 1) asserts: "in order that a war may be just and lawful as regards its cause, it is not enough that the Prince who commences it believes in the justice of his cause; but it is also necessary that, when there is room for doubt, a diligent enquiry, proportionate to the weight and seriousness and difficulty of the matter, be first held, with the assistance of the advice of wise and prudent men who may deservedly be relied on to bring an unbiased and ripe and dispassionate judgment to the consideration of the matter and to the discovery of the truth about it, due attention being given to the arguments of the opposed party so long as they are sincerely and honestly adduced." So Molina. Now, if this be enough to justify the war so far as regards the beginner of it, there will at most be required in the author of a war a just cause from the formal standpoint. For all the points mentioned,

being entirely capable of a prudent observance, tend to make a Prince morally certain of the justice of his cause; and this certainty may be really based on a wrong opinion both of the counsellors, who admittedly often give the advice that is pleasing, and of the Prince himself. And so war will issue with at best a cause that is only formally just, and the formal justice of which rests on the Prince's belief, after a careful examination into the justice of the case but with more or less likelihood of error, that the war which he is beginning is just.

You may say that this opinion is quite consistent with the usage of peoples as regards the external effects of war, it being accepted on both sides that enemies and their property may be pursued and captured, however much the other side may believe that the war is unjust or that there is at any rate little to be said in favor of its being just. Thus, the Romans in the Second Punic War maintained of the Carthaginians that they had no just cause of war; so did the Carthaginians of the Romans: yet neither side doubted that after the proclamation of war men might be captured or killed and all lawful acts of hostility be indulged in. Hence it appears that a just cause in the material sense is not required of the author of a war. And if any one objects that this is counter to what I have already laid down where I said that, so far as the Law of Nations is concerned, no external or any other hidden cause is sufficient for the beginning of a war unless it be in itself adequately relevant and just, as if it follows therefrom that for making a war there is an indispensable requirement of a materially just cause—there being, you may say, no difference between a cause which, in itself, is adequately relevant and just and a cause which is materially just—my answer is, that under the Law of Nations there are degrees in the justice of causes of war. For he who relies on a probable cause and on his belief in the justice of his cause, is a less offender, should he declare war, than he who, being aware of the defective justice of his cause, invents another of a different kind.

Therefore it is enough, as regards a measure of justice in the cause, that, after careful examination, it is considered probable and treated as such by the advisers of the King or State. This brings to the war a justice in the cause as regards the effects under the Law of Nations, although perhaps the cause of the other party, by reason of circumstances unknown to the author of the war, may be in itself more probable and more just.

Now, the material justice of a cause demands a greater and absolutely preponderating probability; and there may be a cause which in itself is in some sort not improbable as regards the war, but which is nevertheless not materially just. We ought, therefore, to distinguish three grades in causes of wars. Some depend on the mere belief of the author of the war, without any regard to probability. An instance of this was afforded by the conduct of Brennus in besieging Clusium, to which reference was made a little way back. These are true causes, but not truly justificatory. Some causes, again, depend on the belief of the author of the war, which in itself is not manifestly improbable, and which is accompanied by just ignorance of the greater proba-

bilities on the opposite side. And some, lastly, have their basis not only in the belief of the author of the war, but also in the fact that the cause itself is, in itself and absolutely speaking, more just and more probable.

Of these kinds of causes the first are utterly insufficient to support a war; and they are called causes, not of right, but only so far as, in point of fact, they exist in the belief of the movers of the war. The causes of the second and third kinds are adequate causes, but only so when at their best; thus, causes of the second kind may suffice as long as the King or Prince who is the author of the war has not perceived the better cause of the opposite side; for directly he perceives this, he begins to be in a sense *mala fide*, and to be bound to desist from fighting and to make amends for the loss already caused thereby.

29 Of course, every effort ought to be made to settle the disputes of Kings and peoples by some other method than arms; for instance, in a friendly way through diplomacy, or perhaps by a kind of compromise in accordance with the decision of skilled arbiters. This was the mode adopted formerly in the dispute between the Emperor Charles V and John III, King of Portugal, about the Molucca islands. (See Molina, aforenamed disp. 103, n. 11.)

30 (3) My third special question is, Whether war may justly be made on Mahometan peoples or pagans and barbarians because of defects in their religion. Alphonsus de Castro (*De justa hæreticorum punitione*, 2, ch. 14) answers in the affirmative, on the ground that God commanded the Children of Israel to destroy many peoples of the Land of Canaan because of their idolatry. But the sounder answer is in the negative; and Covarruvias (*Relectiones on c. peccatum*, part 2, § 10, nn. 4, 5) is more than others an advocate of it, on the ground both of want of sovereignty and jurisdiction on the part of the movers of the war, and of absence of injury; for idolatry and similar sins against the Divine Law or the Law of Nature may tend to the destruction of those only who commit them, but not to the hurt of believers.

31 Where, therefore, there is no special Divine command, God is taken to have reserved to Himself the punishment of those so guilty; and consequently believers who are not injured thereby can not on that ground make war on unbelievers. This reason seems to me to be by itself quite enough; for the former reason about want of jurisdiction does not square with war properly so called. Nay, on the contrary, where there is jurisdiction there may indeed be punishment for offenses committed, but not true war, as proved above.

For the rest, this question was much canvassed because of the wars of the Spaniards against Indians of the West; and such as these, whatever Castro (place named) may say, we can not assert to be just, merely because of the religion or pagan superstition of the Indians. (See Molina, aforenamed tract. 2, disp. 106, n. 2.)

32 (4) A fourth question is, Whether the refusal of passage over a province or kingdom is a just cause of war against the King or Prince who makes the refusal. Many have thought that it is; and they cite the instance

of the war waged by the Israelites against Sihon, King of the Amorites, because he refused them passage over his dominions (*Numbers*, ch. 21, v. 21, onwards). Hereon St. Augustine, as related by Gratian in c. 3, C. 23, qu. 3, says that it is to be noted that the Children of Israel waged just wars against the Amorites for their refusal of innocent passage, which ought to be open by the most equitable Law of human society. By this Biblical instance of the Israelites and by the authority of St. Augustine many are led into affirming as a rule, that individual peoples have a right of passage over foreign realms and that a refusal of this creates a just cause of war. (Thus Victoria, *Relectiones de Indis insulanis*, part 2, pr.; Alphonsus à Castro, place named; Covarruvias, *Relectiones on c. peccatum*, part 2, § 9, n. 4, at *quinta statim*; Molina, above-named disp. 104, n. 7.) And in effect Grotius (*De jure belli ac pacis*, bk. 2, ch. 2, § 13) does not dissent from this doctrine; for although he commends a middle opinion, namely, that there must be a prior demand and that, if passage be then refused, a just requital may follow, yet that antecedent demand of passage is undoubtedly not denied by other doctors, but is rather presupposed by them.

From this opinion, thus generally stated, other modern writers have, 34 however, dissented; such are Ziegler and Felden (*Annotations on Grotius'* § 13, above named), Pufendorf (*De jure naturæ et gentium*, bk. 2, ch. 3, § 5, at *ex adverso tamen*), and Felbinger (disputation *De bello*, th. 25, onwards).

For (1) Kings and other authorities have no less right to forbid foreigners from passing over their realms and provinces than private persons have over their own lands. Private persons can undoubtedly keep intruders off their lands, and it is clear that no wrong is done to them thereby. Therefore Kings and other authorities may also keep intruders from their territories. This reason is employed against Victoria by Molina himself, in the not dissimilar case of the immigration of outsiders and their enjoyment of the property of the foreign province (aforenamed tract. 2, disp. 105, n. 2), where the same is proved and confirmed.

(2) Another reason is in the high imperial interests which are at stake, 35 These would be gravely imperilled if the promiscuous passage of foreign armies were admitted. Accordingly, as Kings and States may justly refuse a demand which, if granted, would be likely to be fatal or dangerous to their lawful power and its exercise, it follows that passage of this kind may no less justly be refused and that the refusal does not give the other side a just cause of war, generally speaking.

(3) Further, although the men who thus pass over foreign territory 36 may not attempt anything revolutionary or do anything harmful in itself (a thing against which it is exceedingly difficult to guard), yet too frequently those countries through which passage has been granted or, in point of fact, taken have become a seat of war; for the opponents may meet with the invading army on the boundary of their kingdom and may compel it to stay where it is. That is what happened to the Gauls who gave admittance to Hannibal

in the Second Punic War; for when, in their lust of booty, they had seen their country become the seat of the war and harassed by the armies of both combatants, they turned their hate back upon Hannibal and away from the Romans. So Livy tells us (*History*, bk. 22, beginning).

37 I admit, however, that, subject to certain conditions, passage over intervening country can not be refused to one who is about to make war on a third power, and that a refusal gives a just cause, if not for declaring war against the refuser, at any rate for opening a way by sword and arms. These conditions are, I think, four: (1) That the passage is becomingly asked for. (2) That the war against the third power does not appear unjust and likely to have dangerous consequences. Hence, when the Emperor of the Turks asks for a passage, intermediate Christian Kings and Princes rightly refuse it on the ground of the common danger, if the objective of his attack be other Christian Kings or States. I say this from the legal standpoint. But since the individual refusers are often too weak, the passage of the infidels is generally secured, to the great hurt of Christian fortunes. How great hurt was done to Christian fortunes by the passage over Venetian territory which was granted to the Turkish Sultan Amarah, the disastrous issue of the battle of Varna has shown us.

38 (3) The third condition lies in the giving of proper security to indemnify against any loss which the passage causes. Hereunder I include all loss alike to crops and to other property of the inhabitants. There should likewise be repaid all expenses, if any, incurred by the King or State through whose territory the alien army passes, in strengthening the guards. And I do not doubt that any entertainment of the soldiery must be at the charges of the power making the passage; and if anything else has in fact been extorted from the country-folk and subjects of the intervening country, a claim can on just principles be made on it to refund the amount, and be enforced
39 by means of the security that has been taken. Certainly throughout the lands of our modern Empire, public laws provide that security for expenses must expressly be taken. See Imperial Abschied of the year 1576, § *Setzen Ordnen und Wollen*, and Imperial Abschied of the year 1582, § *demnach Setzen Ordnen*, according to which the number of soldiers whom foreigners propose to enroll within the Empire, together with the names of the generals and captains, must be indicated to his Sacred Imperial Majesty, and license for passage through the lands of the Empire be obtained.

You may ask how security is to be given. By the Law of Nations this can be effected by giving hostages or in any other fashion agreeable to both sides; but within our Empire there is a special provision that security for an indemnity must be by sureties who are subjects of the Empire and of the Circle through which the soldiery are about to pass, as may be seen in the Abschied just mentioned.

40 (4) The fourth condition which I lay down relates to the manner of the passage. For the greater security of the province, this ought to be left to

the King or State to whom the province belongs through which the forces of the other party have obtained a passage. Hence, by way of caution, it is commonly stipulated that the whole army shall not pass over at the same time, but be sent over by bands and squadrons and regiments, so as to lessen the risk. (On this, see Felbinger, disputation *De bello*, th. 26.) Undoubtedly that mode of going over in parts is more tolerable to the military authorities than the deposition of arms, which is in a sense comparable to the cutting-off of the hands, as Pufendorf (place named) notes, after Florus (bk. 3, ch. 18).

To the above-mentioned instance of Sihon, King of the Amorites, a ⁴¹ double rejoinder is possible: (1) That the King, having quitted his territory with his army, waged war voluntarily against the Israelites, and therefore the justice of the cause is not to be pronounced on solely by reference to the refusal of passage (see Ziegler, on Grotius, place named, at *bellum intulit*). (2) That the Israelites were entitled to a passage into the Land of Canaan by a special right, in that God, the infinitely Good and Great, had given them those lands because of the inhabitants' sins, and so they could rightfully claim a way thither lest the promise should be of no effect. Although, then, the intermediate Kings and peoples either did not know about, or maybe did not believe in, the truth of this promise, yet there ought not on that account to be any abatement in the just claim of the Israelites, especially as they undertook that their passage should be innocent and were ready, as it seems, to make good everything that was desired on that score. This special instance ought not, then, to be expanded into a general rule (a notable inference from *Dig.* 1, 3, 14).

(5) I ask next, Whether, in the particular case of the Turks and Saracens, there is a just cause of war in their detention of the Holy Land. Innocent III thought that there was (n. 7, on c. 8 X. 3, 34; Bartolus, on *Cod.* 1, 7, 1; Jason, n. 25, on *Dig.* 1, 1, 5). Bartolus (place named) gives a less convincing argument, namely, that the Holy Land of Canaan was promised by God to Abraham and his seed, and that we Christians are to-day the seed of Abraham. Now, that Divine promise of a temporal Canaan does not ⁴² enure to the spiritual sons of Abraham, such as Christians are, but refers to natural sons issuing from true generation of blood. Innocent (place named) pronounces such a war just by pontifical authority; but in the same way the reason of the conclusion is not sufficiently well-based. For the consecration of that land by the nativity and passion of Christ does not furnish a strong enough argument for the recovery of temporal power, nor does the ancient right of the Roman Emperors, which was founded on arms (although Innocent uses both reasons in support of his opinion), because it rests on a false hypothesis, namely, that the right of supreme dominion over the Roman provinces has passed to the Pope; against this, there is the common knowledge of to-day, although we willingly admit that there is not to-day any kingdom, or part, of the Christian world, not even the Romano-Germanic Empire, ⁴³ which may rightly claim all the provinces of that most ample, ancient Empire

of the Romans, provinces which, through such varying fortunes, have for so many centuries been in the occupation of different nations. Hence, for lack of a sufficing legal right, I think that the negative answer is the more probable one; and for the same reason, no absolute justification based on ancient Law can be found for the Crusades such as that led against Jerusalem by Godfrey of Bouillon and his princely allies.

45 Nor can the title to universal empire which is set up by some afford a just cause of war, as Grotius rightly concludes (aforenamed bk. 2, ch. 22, § 13). Together with this, we also reject other false causes of, or insufficient pretexts for, war: such as the uncertainty of fear, expediency without necessity, the refusal of marriage (though an especial grievance where there was a large supply of women), covetousness of a richer soil, the wish to govern others against their will, they being now free, etc. (aforenamed ch. 22, § 5, onwards).

So much about the just or unjust causes of an offensive war.

46 In a defensive war also, justice of the cause is required; for if an attack be justly made on us because we have done others some injury and have not complied with their demand for redress, the consequence certainly is, that the side on the defensive is unjust, it being an obligation to make redress voluntarily, and not to drive the other side to just arms by contumaciously refusing friendly restitution or other due performance. And so injustice on the part of the defending side in a war does not lie in there being any illegality in repelling force by force, but rather in a contumacious refusal of just redress. They therefore err who hold that the standard in a defensive war is the mere principles of nature or of simple defense, and who go so far as to make it no war properly so called. Among these is Jason, place named, n. 38, where he is speaking about defense against wrongful injury and so, by analogy of the case when defense in war is just, and offense unjust. But, however this may be, even so it ought not to be denied that a defensive war is war properly so called; for it has both the requisites of war and the effects of war under the Law of Nations.

47 From these same fundamental principles of the Law of Nations, better than in any other way, it is deducible that the pretext of defense is not enough if one has caused loss or done wrong to another and will not make amends therefor. It was almost in this sense that Stenelaides, the ephor, made his fine speech against the Athenians in the Senate of Sparta, wherein he urged the making of the Peloponnesian War because of the wrongs done to the Corinthians and their other allies. He said, "This is not a time for verbal strife in law-courts, for it is not under a verbal injury that our allies are suffering. Let us rather hasten with all our strength to punish the enemy; and let no one tell us that we ought to deliberate long, outraged as we have been. Let those deliberate long who are planning a wrong on others," etc. (See Thucydides, *History*, bk. 1.)

In sum, whenever the cause of war is obviously just on the side of the aggressor, as when some overwhelming loss has notoriously been caused by the other side and no fitting recompense has been given on demand, then there is no just cause in the defensive war. When, however, the offensive war is manifestly unjust, or at any rate when the justice of the cause is equally in doubt on both sides, then, on the contrary, the war is just on the side which is defending itself or warding off attack; for it is enough, to make a defensive war just, that the defender is not clearly inferior as regards the merits of his cause, and is superior in the advantage of possession and in the favor shown to a defendant as such, exactly as, in private disputes, the defendant is by the very fact taken to have good cause when the plaintiff does not rely on a stronger basis of Law and equity. Accordingly, no other special causes call for consideration in the case of a defensive war; but the same causes as, or causes similar to, those discussed by us in connection with an offensive war may be well referred to in this connection also.

So much on the causes of war.

Now let us briefly examine, as the second part of our chapter, the mode of declaring war, or the form of *clarigatio*. Grotius (*De jure belli ac pacis*, bk. 3, ch. 3, § 6, at end, and § 11) tells us how necessary such a proclamation of war is, in order to produce the usual results of war under the Law of Nations. He there postulates the need of a proclamation in order that it may be quite certain that the war is being waged not by private daring, but by the will of the King or people on either side. It is with this in contemplation that war is proclaimed by public functionaries like legates or special nuncios whom antiquity called *caduceatores* or *facials*, and another age called heralds. Further, Grotius (aforenamed ch. 3, § 7) gives the formulas employed in old Roman and Latin usage for declaring war.

But those solemnities in declaring war have fallen into desuetude in modern times, although declaration is itself still necessary of course; and it is clearly discretionary in our day whether war be declared by ambassadors or otherwise, as by public writing. Such a writing, as a substitute for a proclamation, ought to declare and precede the war. We commonly call it a manifesto. In it the justificatory causes of war are ordinarily set out and demonstrated in full.

What is before everything else essential is that the declaration should come to the knowledge of the head of the State himself or of those in whose hands supreme power lies, or at any rate that there should be every probability that it will reach them. The proper procedure in a case where there is no opportunity of serving the declaration of war on the Kings or fathers of the State personally, is to serve it on the nearest prefect or governor. This is what is recorded to have been done in olden days in the wars with Philip of Macedon and Antiochus, on the advice of the *facials*. There is reason in this; for it is parallel to the usage in private cases, where there is no means of serving a writ of summons personally: it is then enough to leave it at the

defendant's home, and in more recent times to employ the edict (*Dig.* 39, 2, 4 (5 and 6); in *Clementinis* 2, 1, 1, and 2, 2, 1).

52 Hence it is also received usage that at times war is declared by public trumpeters, which is in stead of a proclamation; and, as some interval is granted to the party summoned in which he may inform himself and reply on the matter, so equity requires that war should not actually begin at the very moment of the declaration, but that there should be some intervening interval. In olden days when feuds still prevailed within the Empire between the Princes and States, our Caroline Law of The Golden Bull rightly laid it down (tit. 17) that the feud (*die Befehdung*) was "not valid unless for three natural days it had been publicly denounced to the party on whom the attack was to be made, personally or at his usual residence, and that full faith could be obtained for this denunciation by the employment of fit witnesses."

53 Now, a declaration of war may be of two kinds, unconditional and conditional (Grotius, place named, § 7). The former, which is made unconditionally, has the special name of a declaration of war; the conditional variety is conjoined with a demand for some thing and is specially called *clarigatio*, as Grotius (§ 7) says, following Pliny and Livy, although there is another sense in which *clarigatio* means the same as "reprisals" (see Gail, *De pignorationibus observationes* 2, n. 8). I have written about the requisites of reprisals in my eighth disputation on the recent Imperial Abschied (th. 11), and on the distinction between reprisals and impignoration, in the same book (th. 7), following others.

54 It is to be observed that a declaration of war made in principal fashion to the enemy is reckoned as having been made in accessory fashion to their allies. Grotius (above-named ch. 3, § 9), reminds us that this was observed by the Romans in their war with Antiochus, as regards the Ætolians. The Corinthians elsewhere laid down the principle to the Athenians as against the Corcyraeans, saying, "If you bear arms among our enemies, you must be killed with them." And the Romans replied to the ambassadors of Philip, that the act of Publius Cornelius Scipio was right and proper in imprisoning those soldiers of Philip who had borne arms against the Roman people and whom he had captured in battle among the enemy. On this point, however, Grotius (above-named ch. 3, § 10) thinks it more probable that the rule should be taken to be that, in a war absolutely undertaken against a principal enemy, there must be a new declaration in order that an accessory enemy may be attacked as such.

So much on this topic.

CHAPTER XVIII.

On the Effects of War, and what is Lawful therein: especially of captivity, Enslavement of prisoners, Manumission, Ransom, and Postliminy.

SUMMARY.

1. The intention of war-makers is to obtain their rights.
- 2, 4. Up to what time may hostilities continue?
3. Whether the justice of taking up arms may be presumed from victory or the issues of war.
5. How far loss sustained in war and reparation correspond.
- 6-9. The nature of subordinate causes of war; and of the expenses of war, and security for the future.
- 10, 11. Some things are indirectly lawful in war, which are unlawful directly.
12. How far lawful to attack an enemy not only by arms but by fraud also.
13. Whether lawful to corrupt the ministers of an enemy.
14. Lawful to receive deserters.
15. Enemies may mutually inflict hurt on each other.
- 16, 17. Old men, women, children, and the rest of the unarmed mass of the enemy not to be killed.
18. The enemy who make forcible resistance may be killed without distinction; this does not apply equally after a surrender or the laying-down of arms.
19. Unusual to spare the authors of the war; those who were compelled to take up arms with the enemy more readily spared.
- 20, 21. Those who have surrendered on condition of safety can not be killed without perfidy.
22. As a rule an offer to surrender must be accepted and the offerors spared.
- 23, 24. This admits of two exceptions.
- 25-28. Whether hostages may lawfully be killed if the enemy who gave them breaks faith.
29. Grotius' distinction between impunity and license as regards killing hostages rejected.
30. What is permitted to an enemy is not morally bad as against an enemy.
31. Hostile license with regard to property greater under the strict Law of Nations than under the Law of Humanity.
32. Instances of moderation in an enemy.
33. Distinction in hostile license as regards property, according as the spoiling of the property does or does not further the war.
34. A promise given with regard to contributions binds the enemy to desist from devastation, notwithstanding the pretext of "reason of war."
- 35, 36. Temples and holy things, with the exception of idols and their superstitious accessories, to be spared in war.
37. Control of the exercise of religious rights is the reward of a victory.
38. Religious places not to be violated by the enemy.
39. The origin of slavery in captivity, and of captivity in commiseration.
40. The origin of manumission in the good pleasure of the owner.
- 41, 50. Milder usages of Christians in war with one another do not admit of enslaving, but of ransom.
42. Otherwise as to Turks, Tartars, and other barbarians captured in war.
43. Admitted that Christians captured by the Turks become slaves by the Law of Nations.
- 44, 45. Effect of this as regards the *Lex Cornelia* and postliminy.
46. The right of owners over slaves who are truly such, as it exists to-day.
- 47-49. This right not destroyed if the slave begins to profess Christianity; but his condition of servitude should be made more tolerable, or the slave who professes Christianity may even be ransomed at public expense.
- 51, 52-54, 59-61. Five modes of ending slavery set out.
- 55, 56. Whether a King or Prince who is captured is bound by hard conditions stipulated as the price of his liberty.
57. Security for the fulfilment of treaty-terms not enough, but ratification required by the captured King or Prince after his liberation.
58. The instance of Francis, King of France.
62. Whether it is lawful to escape after giving parole not to escape.
63. Immovables, likewise arms, cannon, and other things of direct use in war, do not become the property of the captor.
64. The same with regard to precious things and persons of high rank when captured.

SUMMARY—CONTINUED.

- 65–76. Otherwise as to other captured things belonging to the enemy, which pass to the captor as booty; rejection of the distinction of Grotius.
- 77, 78. The incompleteness of Grotius' description of postliminy shown.
79. The jurist Paulus' description of postliminy considered.
- 80–82. Definition and requisites of postliminy.
83. Christians have postliminy in whatever realm or province of the Christian world they arrive after slavery to barbarians.
84. No application of postliminy or the fiction of the *Lex Cornelia* among Christian enemies.
- 85–88. Whether a Christian has postliminy when he takes refuge from Turkish slavery in a realm which is then at war with his own.
- 89–92. Effects of postliminy as regards personal rights, dignities, and offices.
- 93–95. Whether postliminy obtains as regards marriage.
- 96, 97. Postliminy applies to immovables; but not, as a rule, to movables.
98. Meaning of *Dig.* 49, 15, 28.
99. Further consideration.
100. Covarruvias' distinction, according as captured enemy property is or is not brought within our lines, considered.
101. Application of postliminy to movables, according to Grotius.
102. In time of peace no capture of persons or things, and no postliminy by the Law of Nations.
103. Relics of the nomadic age.
104. Christians captured by Turkish sea-rovers and Turks captured by Christian sea-rovers have postliminy, although in general the doctrine of Roman Law about pirates was contrary.
- 105, 106. Postliminy allowed even to conquered nations and peoples, if they regain their liberty.
107. Whether the right of postliminy can be lost by prescription.

1 The topic of the present chapter is essential to our subject, because all declaration of war and just cause of war would be in vain if it were not lawful for the war-maker to obtain just satisfaction thereby. Now, in order to avoid excess in this matter, the effects of war will be carefully considered in relation to their causes, so that it may be apparent how long the right of hostile offense continues just and lawful.

2 In the forefront, it must be postulated that the license which enemies possess to injure each other comes, as said above, from their express or presumed consent to the war. Since, then, this consent follows the intent of the parties and this intent is best deduced from their object or aim of obtaining their rights, it undoubtedly follows that neither of them is bound to lay down his arms until he has obtained his rights; and the continuance of hostilities until then is permitted.

3 Again, the issues of war being very uncertain and various, as Archidamus shows in Thucydides, the belligerents, by their consent to war, in a sense are submitting to a trial by fate, over which the Deity presides; so that the victorious side may be taken to have the juster cause. "That you have done us wrong," says Scipio Africanus in his address to Hannibal, "you alike confess yourselves and the gods are witnesses, who gave to our former war an issue accordant with human and Divine Law, and are giving and will give the same to this present war." (Livy, *History*, bk. 30.) And the Emperor Charles V recognized the directing hand of the Deity (but the True God) in the victory of Pavia, professing "that herein he perceives that God is openly propitious to him," according to Guicciardini (*History*, bk. 16). Still, the principles of the Divine judgment often vary, and at times they allow an unjust war to prostrate the juster side; on this matter I will not say more here. Meanwhile,

it is clear how long the practice of mutual hostility is allowed, in an exclusive or negative sense, and that is until the wrong done has been redressed; for until this cause has been removed, the war may justly continue. On the other hand, there is not this absence of doubt concerning the question Whether a continuance of the war is permitted after redress for the primary wrong has been obtained. If we follow Franciscus de Victoria (*De jure belli*, n. 56), the answer must be No; for he says, "If the French, at the bidding of their King, make a raid into Spain and waste a countryside, that does not give the Spaniards a right to seize the whole realm of France, but only to avenge the wrong done by the French so far as justice and equity permit, with an addition for the expenses of the war." So Victoria.

If this is true, an arithmetical proportion should exist between the hurt which is the cause of the war and the warlike license allowed; so that it would not be permissible to seek by arms the attainment of more than would have been obtained from a voluntary tender of satisfaction by our opponent, nor to exact a greater penalty than covers the injury done. At first sight, there does not seem much improbability in Victoria's assertion; for war takes the place of a judicial trial in the disputes of Kings and peoples. As, then, a just judge does not award more to a plaintiff than the defendant ought to have made good or done or restored without a trial at all, so the justice of war does not allow a belligerent more than he could have justly claimed without a war.

But since, as Grotius insists (*De jure belli ac pacis*, bk. 3, ch. 1, § 3), our rights are not to be regarded from the standpoint of one principle only, but also from that of subsequently developing causes, it will be very equitable that, in respect of redress, account should be taken also of what has happened during the war. Preëminently conspicuous here will be (1) the damage done by the enemy after the declaration of war, (2) the expenses incurred in the military service. It is quite just that, over and above the principal cause of the war, these should also be recovered and refunded. (3) Security for the future: for he who has once started or carried on a war unjustly, may again make war, though conquered in point of fact; and so the conqueror is within his right in providing for his own safety by depriving him of means to do hurt. The Romans took away from the Carthaginians their ships and naval power in the terms of peace; and when Perseus, not then conquered, offered them far from unsatisfactory terms of peace, they replied that peace would be given on the terms that in these vital affairs the King should grant the Senate free right of settlement as regarded both himself and the whole of Macedonia. This was well-merited. For the Carthaginians had not kept the former peace, and Perseus had broken treaties entered into with the Romans by his father Philip; and, if their strength had not been minished, it would have been just as easy for them to withdraw from the new pacification as from the preceding. Herein the prime consideration is, that the military condition of a conqueror in a just war is but a changeable one, so that he may all the more justly refuse his consent to a peace unless the conquered surrender the

places which they might use as bases for future harm, or give other security at the discretion of the victor and adequate in all fairness and justice. This explains why the Romans, in their olden wars, took away from Antiochus all Asia this side of Mount Taurus and mulcted other Kings in other parts or provinces of their realms, so that they could not wantonly venture on a fresh outbreak.

9 Briefly, then, if the enemy is actually prepared, over and above the prime cause of the war, to pay its costs and to make good the losses caused meanwhile, and, by cession of territory or otherwise, to give adequate security against future offense, then, on principles of equity, Victoria's opinion should be adopted: but if he be not ready to go as far as this, the case is different; for although the enemy may offer to do what, before the outbreak of the war, would have entitled him to a discharge, yet, at the time in question, namely that of his offer, the circumstances are no longer what they were, and therefore, if he desires to make a counter-breach in the justice of the continued resort to force, he must frame his offer of redress in accordance with the changed condition and with the circumstances which have just been pointed out.

10 There is a further general observation which Victoria rightly makes (place named, n. 27), and in which Grotius (place named, ch. 1, § 4) follows him, namely, that in war some things become lawful indirectly and apart from the design of the doer, which are not in themselves lawful; as, for example, where a ship which is full of pirates, but yet has some few innocent persons on board, may nevertheless be fired on despite the danger thereby threatened to the innocent persons. Here Grotius would temper the matter as follows, in accordance with the law of charity: Is the good which our act would probably produce greater than the apprehended evil?

We can see an example hereof in the siege of a fortress: despite the fact that there may be many innocent people in it, a bombardment is resorted to because, in accordance with the principle named, the good which is hoped for from the capture of the fortress, namely, the public security of the district and neighboring lands, outweighs the evil which is feared from the bombardment. For at most there may be, quite apart from any intention of the besiegers, the killing of one or another innocent person, whose death must not be considered a form of penalty, but of misfortune. Now, as to the fundamental fact that the capture, or even the killing, of subjects is allowed by the law of war, though they may themselves be innocent, this must not be treated as a punishment visited on them, but as a hurt to the King or State whose subjects they are, which King or State, by declaring or carrying on war, puts all his or its citizens and subjects into a condition of hostility, so that they may lawfully attack the enemy and be in like manner attacked and violated by him.

12 It is immaterial whether the enemy use guile or only the force of arms in fighting, provided only the guile is not repugnant to probity and the healthy usage of nations, as, for example, poisoning would be or the treacher-

ous seduction and corruption of the enemy's men, say his ministers or subjects, to the murder of their sovereign or to rebellion.

On this point, Grotius lays down a neat rule for us, saying (aforenamed ch. 1, § 21) : " Whatever a man may not do of himself, it is improper to urge or solicit him to do : for example, a subject may not murder his king or surrender a town without public counsel or despoil his fellow-citizens; and therefore it is improper to procure a citizen, who remains such, to do these things." On this principle, then, the numerous instances of plots and treacherous corruption can not (I will not say be justified, but) be excused by the standard of the Law of Nations. A different rule is, however, ordinarily stated if use is made of the treachery of the opponent's ministers or subjects without any solicitation, since no law forbids that. See Grotius, place named, § 22, where he finds an example in the reception of deserters, whom it is just and right to admit if they come voluntarily. And plainly the same is also allowed in war in the case of more notable leaders and captains, if they leave their former service in dudgeon and attach themselves to the other side, as in olden time Masanissa did when he deserted the Carthaginians for the Romans, and as in the last century John de Medici did when he quitted the Imperial side for the French camp, and on the other hand as the Duke of Bourbon and Auvergne did when he forsook the French and joined himself to Charles V; all these were well received. And at the present day examples of this kind are to be met everywhere, which I prefer not to specify.

So much about the license of war in general.

In particular, one enemy may hurt another alike in person and in property, and this on both sides, alike on that which has a just cause of war and on that of his opponent the justice of whose cause is less probable, as I have already said above and as Grotius definitely declares (aforenamed bk. 3, ch. 4, § 3). But this must of course be understood, as declared in the preceding chapter, of the external acts of the Law of Nations, and not of the internal forum of conscience, as Grotius himself explains (§ 3, above).

Further, the injuries which enemies may inflict on each other include not only capture, but wounds also and death; this I would show by examples, as Grotius does (above-named ch. 4, § 5), were it not notorious. There is indeed a hardship in the fact that the people who may be killed are not only armed men, but others without distinction, and even children and women, although Grotius (ch. 4, §§ 6, 9) would have this refer only to the strict Law of Nations, and the same writer in bk. 3, ch. 11, § 9, more correctly makes an exception of children, women, and old men. Moreover, Pope Alexander III, in c. 2, X. 1, 34, names others who in time of war enjoy public security, like priests, monks, merchants, and country folk, etc., although little observance is paid to this in present-day warfare.

It is further notable that, although the Law of Nations allows in general the slaughter of enemies, yet it is not to be indiscriminately put into execution in all its rigor, but only under reserve of a threefold "*temperamentum*" as

regards persons and circumstances and time. As regards persons: besides old men, women, and children, who are exempt under the milder rule, as I have said, the rest of the unarmed multitude are also not to be slaughtered. But the “*temperamentum*” as regards circumstances and time applies especially to armed enemies; for while they may lawfully be killed without discrimination in the heat of conflict or when still armed so as to be able to do hurt, yet this does not hold good after a surrender or laying-down of arms.

18 The chief thing, then, is to draw a distinction according to circumstances; for some were the authors or instigators of the war, while others did nothing of the kind, but merely followed the enemy's camp. Now, the former are not usually spared, but can properly be claimed for punishment by the victor. Thus, in the Ætolian War the Romans required the surrender of Dicæarchus and Menetas of Epirus, the Prince Amynander, and the chieftains of the Athamanians; and in the war with Antiochus they demanded the surrender of Hannibal. And it is quite right that the authors and inciters of a war should suffer punishment by way of example for the great mischief they have wrought; and it is to be wished that nowadays all men of that kind who drive Christian Kings and States into war should meet that fate, so that at times some greater protection might be afforded to public peace.

The rest of the armed mass can also be divided into two classes, according as they followed the army willingly or under compulsion; the latter can more easily and readily be spared than the former. Thus, the Thebans obtained this boon from the conquering Persians after the fight at Thermopylæ on this ground; for they declared that they had joined the forces of the rest of Greece under compulsion, and not of their free will (*Herodotus, Polymnia*).

20 All those, however, to whom this boon has once been promised ought to be safe without distinction and able to rely on the promisor's good faith. And so Hannibal acted in violation of the Law of Nations when he subsequently ordered the Roman fugitives from the battle of Thrasymenus to be cast into chains, although they had made an agreement with the Carthaginian Maharbal whereby they were to be safe and to be allowed to depart clothed in a single garment (*Livy, History*, bk. 22). And it was with barbaric perfidy that Mahomet Bassa, the Turk, ordered the execution of Lozantius and the garrison of Temeswar, to whom he had promised their lives and a safe-conduct, according to de Thou (*History*, bk. 9). Hannibal might indeed find a colorable excuse for his act in that Maharbal had without his knowledge promised the Romans a free departure; but Mahomet had not this or any similar pretext when, with a perfidy not unusual in the Turks, he ordered that men who had surrendered under an express undertaking for safety should either be killed or sent into captivity.

22 A question is raised whether, and on what conditions, those who desire to surrender should be allowed to do so, and be spared. Grotius (bk. 3, ch. 11, § 14) holds that the surrender of those who bargain for safety of life

ought not to be refused either in battle or in a siege; and in § 15 he gives as his opinion that they also ought to be spared who throw themselves as suppliants unconditionally on the victor's mercy—what we call *auf Gnad und Ungnad sich ergeben*. This opinion, though as a rule right and humane because of the horror felt by man at wanton shedding of human blood, admits of two exceptions:

(1) Where those desirous of surrender have resisted to the end and 23 only offer surrender when the other side, after much expenditure of blood, has practically got the victory in his hands: In this case the agreement is offered too late and may be rejected as a punishment for contumacy, especially when this is done by way of example in order to deter others from the like ferocity. Thus, Gustavus Adolphus, King of Sweden, is said to have rejected the over-tardy surrender of the garrison at the storming of Frankfort on the Oder.

(2) There is an exception also in the case of great offenders; for it would be absurd to allow them to obtain impunity by offering a voluntary surrender on condition of a safety which they do not deserve. Their surrender, then, may properly be refused, who have deserved death by their wrong-doing and who bargain for safety. This holds good also of those who, 24 though not equally guilty, refuse to surrender to death those who are thus guilty, affording them a protection under an express agreement for safety. And so Joab refused to raise the siege of the town of Abel unless the townspeople gave up the rebel Sheba, the son of Bichri; and Sheba's head was accordingly cut off and cast over the walls, in compliance with the demand of the besiegers (*2 Samuel*, ch. 20, vv. 21, 22).

Another question is, Whether hostages may lawfully be killed if the 25 enemy who gave them breaks faith. Grotius rightly denies this (aforenamed ch. 11, § 18), on the ground that the ownership in a man's life is reserved to God and can not be taken from Him by the consent or agreement of private persons; this doctrine was commonly held before Grotius by the doctors (post-glossators, on word *supplicium* in c. 19, C. 23, qu. 5; Felinus, n. 2, on c. 2, X. 1, 2; Cino and Saliceti, on *Cod.* 9, 4, 4). And just as, according to the doctors quoted, a surety can not be killed or visited with bodily punishment in the stead of a criminal principal who flees, despite the text in c. 19, C. 23, qu. 5, which the commonly received gloss thereon rightly rejects, so also a 26 hostage, as being a public-surety of his King or State, can not be put to death if the King or State, on whose behalf he is given, breaks faith; for, whether we look at Positive Law (*Dig.* 9, 2, 13; and c. 36, X. 5, 39) or at the Law of Nature and of Nations, we always find in operation the principle that nobody owns his body or limbs.

This point is clear enough if we are talking about the consent or simple 27 agreement of private persons; but the question is more doubtful in the case where a man is allowed by statute or usage to bind himself to corporal punishment on behalf of another. For then many, following the gloss on c. 19, C.

23, qu. 5, which makes an exception of this case, think that the authority of such statute or usage, taken in conjunction with the private party's consent, can bind him to the penalty in question, even though, apart from the agreement, he is not liable to it (thus Decio, n. 1, on c. 2, X. 1, 2; Rocco Corti, on c. 11, X. 1, 4; Angelus, at passage *est tamen*, on *Cod.* 9, 3, 2; Menochio, *De arbitriis judicium questionibus*, casus 304, n. 4).

If this opinion be true, it would also seem that a surety may be bound for another to the capital penalty of death; and so we are led by this argument to make the same assertion of a hostage—among those Kings or peoples, 28 that is, who observe such laws and usages. But, following Felinus (place named), Didacus Covarruvias (*Variae resolutiones*, bk. 2, ch. 8, n. 8) dissents from this opinion, on the ground that no human law can ordain, and no human usage introduce, a rule whereby one man's life may in virtue of an agreement be taken away for another man's offense. And so, neither in the case of a surety nor in the case of a hostage, can any different opinion be based on the fact that a law or usage sanctions the contracting of an obligation to a corporal penalty on behalf of another; but the same rule applies here as applies where the obligation to such a penalty reposes on the mere consent or agreement of private persons, inasmuch as nothing repugnant to the Divine Law can be introduced by statute or by usage (c. 11, X. 1, 4, and the canonists thereon).

29 In consequence hereof, I can not admit the distinction which Grotius (aforenamed § 18) draws here between killing hostages with impunity and a license to kill them, as if the former was rightly to be granted but not the latter. For, seeing that human laws or usages as regards hostages can not annul the Divine Law (note on c. 11, X. 1, 4; and Covarruvias, aforenamed ch. 8, n. 7), so they can not annul the penalty named in the Divine Law for those who kill hostages—not even if the other side demand it, although I should myself think it more likely that, if such a thing happened among different nations, they would kill their hostages.

30 I hold it indubitable that no enemy may indulge in conduct which is morally base, like rape and adultery, etc., although it may be that the commission of such acts is connived at; for what is forbidden by the Divine and eternal Moral Law can not be rendered lawful by the Law of Nations or by human ordinance.

31 Now, as regards any "*temperamentum*" of hostilities towards enemy property, it is a kind of virtue to spare it in some sort; but the question What is allowed by the law of nations? is a different one. Just as, if we are talking about a miser, in many cases it may be that he is not unjust in rigidly exacting his debts; yet at the same time he displays no virtue herein, when he thus stands on his strict rights out of avarice and without making any distinctions: so also, in the matter before us, it is not a breach of right for an enemy to burn and ravage a hostile countryside, and he is only doing what is allowed him by the strict Law of Nations; yet it is praiseworthy and glorious in him not to

push his right to these extremes. Aye, the conduct of Alexander the Great 32 in sparing long ago the soil of Asia, and the conduct of Gustavus Adolphus in refraining from the destruction of the Elector of Bavaria's palace at Munich, and other instances of a like moderation in others, are always held in remembrance, although the burning of Persepolis, which Alexander the Great, when drunk, ordered at the instigation of Thais, is no small smirch on the glory of his moderation. Beyond doubt, where the wasting and plunder of enemy territory and other evils are inevitable for the weakening of an enemy's strength, they are all allowed. Hence the saying of Onosander, who noted, "Let the general destroy and burn and ravage the enemy's lands, for the want of money and food breaks down a war as much as the plenty of them holds it up." (Grotius, bk. 3, ch. 12, at beginning.)

A great distinction, therefore, must be drawn between such a destruction 33 of property as can materially conduce to victory in war, and the destruction of other things. The former kind of destruction of enemy property is not only lawful in itself, but absolutely free from blame; but one may object, to the latter kind of destruction, that if not improper by Law it is at any rate contrary to the dictates of humanity. The acts included in this latter class are the cutting-down of fruit-trees, the destruction of palaces and other fine buildings, the burning of harmless farms, and such profitless acts as these. It is barbarous, indeed, even if you have made no agreement against it, to indulge in indiscriminate burnings, as in Ovid's

Et cremat insontes hostica turba casas.

(And the swarming bands of the enemy burn the harmless huts.)

Further, it is unjust—aye, most unjust—if, after the enemy has undertaken, in return for definite contributions which he has received, not to ravage the country or harm the buildings of any locality, he nevertheless proceeds to harry the country with fire and other disasters of war. That is a thing that no "*ratio belli*" can excuse; for this never affords a pretext for breach of faith, and no such act is permitted by the Law of Nations. 34

And what are we to declare with regard to temples and other things 35 dedicated to Divine worship? May an enemy destroy these? Here, too, a negative answer is more becoming to man, out of reverence for the Deity, especially among those who worship the same God under the same dispensation, even though they may differ from one another in some points of dogma or ritual (thus Grotius, above-named ch. 12, § 6). Roman Catholic Kings or Princes certainly ought not to profane Protestant churches which they take in war, and *vice versa*. So, also, the same holds good in a war between Turks and Persians, so long as that Mahometan heresy persists. Nay, it would be more correct for me to say generally that no places where the true God, the Creator of heaven and earth, and the Preserver of all things, is worshiped, may be profaned, however much we must disapprove of the worship in itself; for any fashion of Divine worship is more tolerable, as one of the pagan Emperors said, than the profanation of such places.

36 Much less may the temples or other sacred things that are captured be profaned if the worship in question be a correct worship of the true God. It is therefore gross barbarism for the Turks and Tartars to turn into stables the Christian churches which they have seized in war; but the law is different, I think, with the shrines of idols, provided this be done by people who know the true God, unless there be some who, maddened by an equal superstition, erroneously believe the worship of idols to be true worship, and so are prevented from doing in such a case what is in itself lawful. We often read, in the Bible, how the Israelites destroyed pagan shrines and idols; and the Portuguese in the Congo Kingdom of Africa, and the Spaniards in the West Indies, following their example, quite properly burned the shrines of idols and destroyed sacred things of that superstition.

37 There clearly is no doubt that the Law of Nations may be invoked, even against the temples of enemies, for purposes not of profanation, but of fitting control. In this way, a victor often introduces his own religious cult; of this elsewhere.

38 What about places that have been made sacred? The same holds good of these also, under the precepts of humanity; namely, that they ought to be deemed, with Grotius (above-named ch. 12, § 7), outside enemy violence and spoliation. When Darius, King of the Persians, taunted the Scythians for not coming forth in battle-array, they told him that he would soon find men if he violated the mounds and sepulchers of their ancestors, which were situated not far away, as we have recounted above, following Herodotus; the suggestion was, that such an act, more than any other, would sharpen their just wrath against an enemy.

Now, leaving these questions, we must pass on to the other more special and peculiar topics of our chapter, such as captivity, slavery and the like.

39 Seeing, then, that it would be harsh and brutal to kill all who fall into the enemy's hands, it has become a rule of the common Law of Nations that it is just and right to capture the enemy and reduce them to slavery (*Inst.* 1, 2, 2; and 1, 3, 2, onwards). For in recompense for the boon of their preservation, it was fair that they should be thought bound to render services, such as those which we read in sacred history were rendered by the Gibeonites (*Joshua*, ch. 9, vv. 23, 27). And these servile ministrations lasted as long as the lord who had preserved them, or his successor in title, wished.

40 Manumission, accordingly, sprang from a contrary intent on the part of the lord; and by it liberty was given to the slaves (*Dig.* 1, 1, 4). This
41 was for many centuries the recognized observance of belligerent peoples; but a later age was milder in the wars of Christians with one another, prisoners being no longer reduced to slavery; but all the property they had with them was forfeited, and they were detained until either ransom was forthcoming or there was an exchange of prisoners. This is said to have been introduced as the rule among Christians of different nations about three hundred years ago.

But the ancient usage of enslaving is clearly not yet obsolete in the wars 42 of the Turks and of other barbarians. For they reduce men of our side whom they capture into rigorous slavery; and so in return the prisoners whom we take are reckoned to be in the same condition (*Angelus Aretinus, on Inst. 2, 1, 17; Alciati, on Dig. 50, 16, 118; Mynsinger, n. 5, on Inst. 1, 3, 3*), and it is indubitable that Turks or Tartars or the like enemies become slaves when captured by us.

Whether, however, the same thing happens on the other side when our 43 men are captured by them, is not equally free from difficulty. Some there are, indeed, who in this case take the contrary view, that our men do not become slaves, because the wars of Turks and barbarians against Christians are unjust wars and so can not produce the effects of the ancient Law of Nations as regards captivity and the like. But, to speak truth, this opinion seems to me scarcely maintainable; (1) Because not all wars of Turks against Christians are by the Law of Nations and by necessity unjust. This is exemplified by the war of Amurath against Ladislaus, King of Hungary. The Turk was then defending himself against an attack made on him by the Hungarians despite a former peace, which had been confirmed by an oath. So who would not say that that war was a just one on the side of the Turks? (2) Then, even if it be granted as a universal rule that the wars of Turks are unjust, we have already shown, above, that the effects known to the Law of Nations may issue from a war which is materially unjust. It may seem that a different rule would obtain in the forum of Heaven; but we are here dealing with the effects under the Law of Nations, and so, in that sense, Christians, when captured in war by Turks, do indeed become slaves.

A man so captured can not, therefore, make a will or perform any other 44 act of the Civil Law, as long as he remains in slavery. They who affirm the contrary (namely, that wills made by those who remain in the regions of barbarism are valid and are reckoned valid by the Law of Nations, as also their contracts) must be taken to refer to those who remain there on a legation or in some other way not involving captivity; although, even then, it would be more correct to say that their wills (and their contracts, too) ought to be made in accordance with the Law of their own country and of the place whence they were sent, because of the fiction of the Law of Nations whereby legates and their suite are held, as said above in the chapter on legates, to be living in the realm or territory of him who sends them.

It follows, then, from what has been said, that the *Lex Cornelia* and the 45 rules of postliminy apply in the case of those held captive by the Turks. This produces no small effect in the devolution of inheritances and in other acts in the Law. For example, suppose there are three brothers, Titius, Caius, and Sempronius: Caius dies first, leaving children; Sempronius, who is childless, is captured by the Turks; and then Titius, in Sempronius' lifetime, dies, also leaving children. A question arises about the succession to Sempronius between the sons of the brothers Titius and Caius. They will succeed *per*

capita, although Sempronius, naturally speaking, survived Titius, provided that Sempronius at death was still in Turkish slavery. This is because, by the fiction of the *Lex Cornelia*, he is taken to have died the moment he went into captivity, and therefore before the death of Titius, with the result that the sons of the brothers, Titius and Caius, are held to compete by themselves for the inheritance of their uncle. They will consequently succeed *per capita*; whereas, if Sempronius were considered as really dying after the death of Titius, or if he returned from Turkish slavery with the benefit of postliminy, they would succeed *per stirpes*. And so in similar cases (*Dig.* 49, 15, 22 (pr. and 1)).

- 46 It is a further consequence, when prisoners of war become the slaves of their captor, that their lord may dispose of them and other rights in connection with them either *inter vivos* or by way of last will. Thus, Princes and magnates sometimes buy such persons, and sometimes receive them by way of gift. Nevertheless they, being genuinely slaves, are susceptible of genuine manumission.
- 47 It is, however, asked whether Turks or Tartars or other barbarians are manumitted by the mere fact of subsequently embracing Christianity. I think not, (1) Because the right acquired by capture of an enemy can not be taken away from the lord without his consent; and this all the less (2) Because the Gospel-rule does not destroy the rights of masters over their slaves, as appears in many passages (*Epistle to Ephesians*, ch. 6, v. 5; to *Colossians*, ch. 3, v. 22; to *Titus*, ch. 2, v. 9; *1 Peter*, ch. 2, v. 18, etc.), (3)
- 48 Because the converted slaves of Jews have to be bought back into the faith of Christ; this shows that they do not become free *ipso jure* (c. 1, X. 5, 6), although their master can not any further treat them as chattels of commerce (*Cod.* 1, 10, 1). Much more, then, in the case when the former owner continues capable of exercising commercial rights over his slave, must we say that the profession of Christianity does not *ipso jure* free the slave, but that even then manumission or ransom is necessary.
- 49 It can not, indeed, be denied, from the standpoint of humanity, that in some places, as in Hungary, captive Turks or Tartars are too frequently flogged. If they have been converted to Christianity, that and the like over-harsh incidents of servitude ought to be relaxed and changed to a more tolerable lot until they obtain full liberty by manumission or ransom. This follows from the dictum of Pope Alexander III in c. 5, X. 5, 6, that the condition of those who have been converted to the faith ought to be better than it was before their conversion. Indeed, it would be consistent with humanity that such persons should be forthwith ransomed at public expense.

- 50 Now, the capture of enemies does not, among Christians at the present day, bring about the old slavery, but, as I said, only gives a right of holding to ransom or of detaining the prisoner in prison or under custody; and when the ransom-price is paid, he must be released. Although, therefore, Christians who are nowadays captured by a Christian enemy remain free, yet the

exercise of their liberty is so restrained by the custody mentioned that the prisoners have not a right to the enjoyment of full liberty.

As to the modes in which captivity ends, I may name five: (1) Death of 51 the prisoner. This breaks his prison and fetters and captivity, just as it frees him from other human ills. (2) Manumission or release from bondage. The design of this may be either that after manumission the man is to go on living in his new state as a citizen or free man, or that he is to return to his own country. In this latter connection we have the release as of grace which Kings and great Princes are wont to employ, either by way of displaying virtue, as when Alexander the Great sent Porus, King of India, back to his kingdom, with the loss only of his kingly title, or by way of securing good-will, as when Antiochus, King of Asia, sent the son of Scipio Africanus, whom he had captured, back to his father. A third way of ending captivity, and a very ancient 52 one, is ransom for a price. That this was a usage coming down to them from their ancestors was not denied by Manlius Torquatus, although he at the same time proposed in the Senate that Hannibal's prisoners taken at the Battle of Cannæ should, for certain reasons, not be ransomed (*Livy, History*, bk. 22).

What, then, in such a case? May the enemies be sold for lack of ransom? 53 Hannibal did this later on. But the question is, Whether this is lawful to-day among Christians who do not reduce their prisoners to genuine slavery. I think that none the less it is permissible nowadays, not, indeed, in such a case, to sell the prisoners as slaves, but to transfer the rights which their captor has over them, as if they were debtors of their ransom-price, so that, just as they might have been detained by their vendor until this had been satisfied, so, by the same title, they may be detained by their buyer. Accordingly, by the Roman Law also the ransomer had a lien over the ransomed, although the latter was not meanwhile treated as a genuine slave (*Dig. 49, 15, 19, 9; and Cod. 8, 50: 2 and 16 and 203*).

But what the amount of the ransom-price should be, and by whom it 54 should be fixed, is a further question. The better opinion is, that by the Law of Nations it is fixed by the victorious side, consistently, however, with moderation, and not so that it is thought lawful to put it at an immense figure. The usual rule, however, in the case of the greater mass of prisoners, is to fix it on a low scale. "The Carthaginians," boasts Publius Scipio, the father of Scipio Africanus (*Livy, History*, bk. 21), "were allowed to depart from Eryx, valued at eighteen *denarii* a head." But where, as is often the case to-day, there has been a definite agreement between the two sides, the price of release must be paid in accordance with the tenor of the agreement. And in the case of captured Kings or Princes or generals, or such-like persons of higher rank, the amount of the ransom is higher, in proportion to their rank; the matter depends wholly on the fair and just discretion of the captor.

It may, further, be asked whether a King or Prince is bound by the 55 hard conditions on which, when captive, he may have obtained his liberty. The principle on which doubt is cast on this, is that such a promise is not freely

given, but is extorted by dread of captivity; such a promise has no valid effect in the Civil Law (*Dig.* 4, 2, 22). And so, in the preceding century, Francis I, King of France, after his capture at the Battle of Pavia, made bitter complaint of the over-harsh terms of his liberation (Guicciardini, *History*, bk. 56 17, towards beginning). The principle on which this question should be decided may be found in the fact that the detention of a captured enemy is not unlawful, but is permitted by the Law of Nations. Now, the rules which nullify a promise made during imprisonment imply that the imprisonment is unlawful, as is clear from *Dig.* 4, 2, 3, 1. Natural Reason also suggests the same distinction. The rule must, then, not be extended to the case where a promise is made by one lawfully detained in captivity, especially where the detention is humane and such, in the case of a captured King or Prince, as was exercised over King Francis, with regard to whom Guicciardini writes (*History*, bk. 15, at end), "On the day after the victory, the King was conveyed to the fortress of Pizzichitone; and here, save as regards liberty (for he was most carefully guarded), he was honorably treated in regal fashion."

57 In order, however, that promises made in these circumstances may produce effect and be free from all doubt of extortion and violence, two conditions are usually annexed: (1) That the King or Prince who is to be freed gives, before his liberation, security for the performance of his undertakings; (2) That, after his liberation and when reinstated over his subjects, he ratifies his undertakings, and gives a previous promise that he will do this. These conditions were observed in the liberation of King Francis; but the event showed that the caution taken was not enough. For the King, when set at liberty, refused to subscribe to the terms of the peace, but made fresh alliances on the contrary and started a difficult war against Charles V, with the object of recovering his sons, who had been given as hostages for his own release. It is therefore a wise precaution to detain the captive enemy in custody until the undertakings given in the peace are fulfilled; or else, in addition to the hostages for the carrying out of the peace, to take special security—for example, by sureties, on whom pressure can immediately be brought to bear, or by the delivery, by way of pledge, of some important position, especially a fortified one. Let us, however, quit this topic, political questions being, as said above, distinct from the Law of Nations.

59 A fourth principal way in which captivity may end, is by exchange; as when, there being prisoners on both sides, they are released by each side at some third place, in equal number and of equal rank. This is not infrequent at the present day. And captive leaders, generals or commanders, are particularly solicitous not to be exchanged for one of less rank, the fear being that this should be dishonoring to them. There is no doubt that, although the war is still going on, the exchanged persons must not attack each other in the very place where the exchange was made; for the agreement on public faith is for the recovery of complete liberty. All the same, there is no restriction on their capacity to do each other hurt elsewhere.

Lastly, the fifth way in which captivity is ended is by the escape of the 60 prisoners and their return to their own side. Undoubtedly, at first sight, one might doubt whether a prisoner may escape to his own side from the enemy—on the analogy of the fugitive slave, whose escape is treated by Law as so improper that he is held to commit a theft of himself by such a flight. But 61 the answer is, that there is a difference between the condition of a fugitive slave and of a captured enemy who escapes to his own side. The flight of the former, in itself and being what it is, is not equally permitted by the Law of Nations, it not being necessary for the fugitives, in order to recover their liberty, to escape to a different nation, both because they often are home-born slaves (*vernæ*), who have no other nation to whom they may betake themselves, and also because they generally have the intent of remaining within the boundaries of the same Empire, and of withdrawing themselves from servitude to their masters; and lastly, because at the present day, save in a war between Christians and barbarians, prisoners of war do not become the slaves of their captors, and therefore they do not by their flight commit theft of themselves. Now it would be absurd to allow an escape from the more bearable captivity imposed by Christians and not from the harsher captivity imposed by barbarians. There is, moreover, the fact that Roman Law approves of such an escape as this from the enemy, as being conformable to the Law of Nations (*Dig.* 49, 15, 26).

But what if parole has been given not to attempt escape? That cer- 62 tainly deprives a man of the capacity therefor; he must abide by his word. It was on that ground that Attilius Regulus, with unsullied faith, returned to the Carthaginians, though well aware of the utter tortures that awaited him. On the other hand, the man among the Romans captured at Cannæ, who put a deceitful and illusory interpretation upon the oath which he had given to return, was ordered by the Senate to be taken back to Hannibal under the custody of public guards.

So much about the captivity of persons, and also about manumission, ransom, exchange and escape, though on this last point something remains to be added below in connection with postliminy.

Further, enemy property is also captured, and then passes into the owner- 63 ship of the captor, as said above. A distinction is, however, to be observed. For immovables do not pass by the Law of Occupation to private persons as such, but rest in him under whose auspices the war is being waged; and the same applies to cannon, gunpowder, and the like things which are adapted to warlike use. The same rule applies also to such movables as are extremely valuable. (Bruning, *Discurs. Palæstr. Imp.*, th. 3, bk. 6, followed by Har- 64 precht, n. 8, on *Inst.* 2, 1, 17.)

This is what also happens when persons of distinction are captured. They ought to be handed over to the lord of the war; but in such cases the captor usually receives some remuneration for his toil, or as a reward for his valor.

65 Hugo Grotius (*De jure belli ac pacis*, bk. 3, ch. 6, § 8, onwards) deals fully with this topic of acquisition in war, attempting to show, contrary to the usually received opinion of commentators, that things taken in war do not belong to the captors—he is speaking of things captured by an operation of war—but are acquired by the people under whose auspices the war is being carried on (Grotius, aforenamed ch. 6, § 14). Antonio Merenda (*Controversie*, bk. 2, ch. 22) also supports this opinion. If, however, the capture is made by a private act, though on the occasion of a public war, Grotius himself admits that the thing is acquired by the private person at once and directly (§ 10); and he declares this again in § 12; so that if soldiers take anything when not in battle-array nor in the course of carrying out orders, but when acting under their general right or by simple permission, the thing immediately belongs to them. Briefly, when there is a regular hand-to-hand engagement, or when there is a skirmish under the orders of superior officers, or when a city is besieged, these are public acts of war; and so, according to Grotius, things then captured do not belong to the individual captors, but to their State: but in other operations, such as single combats, independent raids, and the like, ownership is acquired for the private captors.

67 I think, however, that the opposite is the sounder doctrine; namely, that whatever is taken from the enemy, even by a public act of war, belongs to the individual captors. My reasons are: (1) That the State employs the services of individual soldiers to compass the end of the war, but not with the direct intent to capture enemy property promiscuously as an end in itself; for whether they capture anything, depends merely on whether the enemy happens to have anything when in line of battle, or fighting, or in the besieged town, so that 68 the soldiers have a chance of capturing it. Indeed, the capture is itself most usually a private act, whether it occur in a battle or in the storm of a city; for the State or the generals do not give any order in chief to the soldiery to take plunder, but they simply allow it as occasion arises. Their order is, to overcome the enemy, or to storm the city, etc. Consequently, the alleged basis of Grotius' argument in the public service of the soldiery crumbles away.

(2) Enemy property is usually taken by some form of violence, and more often than not with considerable risk to the captor; as, then, the risk attaches to the captors as individuals, so also ought the corresponding gain, with the result that the individuals acquire for themselves what they capture (by inference from *Dig.* 56, 17, 10). And there is also the authority of the Emperor Justinian, in *Inst.* 2, 1, 17; and of the jurist Gaius, in *Dig.* 41, 1, 5, 7, that, generally and without any distinction as to the acts of war which conduce thereto, things captured by the enemy become the property of the captor.

69 (3) There is also the response of Celsus, in *Dig.* 49, 15, 51, 1, to the effect that enemy property which, at the time, is on our territory, is not public property but passes with the ownership of the occupant, even though he be a civilian. How can we hold that an armed soldier is in a worse condition

when engaged in battle or other operation of war, wherein he sustains much greater dangers on behalf of the State? (Add the response of Pomponius in *Dig.* 49, 15, 52, and of Tryphoninus in *Dig.* 49, 15, 12, pr.)

(4) Lastly, military observance and the usage of our own day give 70 further proof of the same thing; for things taken by the troops in battle or other operation of war, such as horses, money, clothes, they acquire and keep no less than what they seize elsewhere in an independent raid. There ought not, then, to be any distinction on this account.

And I do not find any convincing force in the instances of different nations to the contrary, which Grotius (place named) has brought together from the history of the Romans, Greeks, French, and others. These instances only suffice to show that in former days spoil was either left to the State or was divided among the troops. For, so far as the evidence of Scipio Africanus, from Livy (*History*, bk. 30), goes, it must be observed that he was 71 speaking of Syphax just after his defeat. Now, when the principal enemy has given himself up or, being obviously beaten, has come into our power, there is of course no doubt that everything that is his becomes the spoil of the King or people under whose auspices the war was waged, and does not pass into the ownership of any private occupant. Hugo Donellus examines this well (*Commentarius juris civilis*, bk. 4, ch. 21, at *postquam autem*, onwards).

The principle of this distinction, namely, between things seized during 72 the war and things seized after the surrender or overthrow of the enemy, is a thoroughly sound one, although Harprecht (place named) seems doubtful about it. In the circumstances named, the property is, of course, no longer enemy property; for, just as the enemy's condition is then changed, so that instead of being a foe he becomes a subject, so also the same fate befalls his property by the Law of Nations, it vesting in the victor King or people, with the result that it is no longer susceptible of occupation by private individuals, but any such attempt to occupy it would amount to peculation, as when public money is misappropriated (*Dig.* 48, 13, 16).

These considerations likewise furnish a reply to the other instances from 73 Roman history. But, with special reference to those in which spoil was brought in to the public treasury, it must be remarked that spoil taken by a general, either under the terms of peace or otherwise on account of the Republic, was handed over to the quæstors, in order that it might be entered in the public accounts. But what was captured by private individuals as such, was not, properly speaking, included under such spoil save where, because of the great value, or some peculiar quality, of the thing captured, a different rule obtained, in accordance with the details set out above.

But you will say, (1) Then the position of a commanding officer will be 74 worse than that of the common soldier, if the latter can by occupation acquire enemy property for himself but the commander acquires it for the State. That is an objection against Donellus raised by Ziegler (*Annotations* on Grotius' aforenamed ch. 6, § 8). But the answer to this has already in a

sense been anticipated. For those things or persons of the enemy that can not, when captured, pass into any other ownership or disposition than that of the victor King or people, are by a certain presumption seized in the name of the victor under whose auspices the struggle is carried on; while, as to other things, the commander can of course, if he likes, seize them and acquire them for himself even during the war, and so his position is not worse than a common soldier's. If, however, such instances of more primitive self-restraint are actually found, in which commanders have in like manner passed on to the public treasury whatever enemy property has come to them through capture in war, I think these commanders acted with unique virtue and from a desire to aggrandize the State rather than in obedience to any rule of the Law of Nations. And I fear that our times will not furnish any parallel instance of the like abstinence on the part of commanders.

76 You will retort, (2) Then the promises of booty which commanders sometimes make to their men in order to whet their courage in battle, especially when a town has to be stormed, are quite futile, seeing that the men, as such and apart from the promise, have a right under the Law of Nations to capture enemy property. My answer is again a denial of the consequence. There are, all the same, differences in degree; for when a commander has made his men an express promise of booty in the event of victory, their right to plunder enemy property rests on a surer basis than if there were no promise. The commander, being in a sense bound contractually, can not at pleasure forbid looting and take away the loot, as would otherwise have been within his discretion.

So much about the capture of enemy property.

77 Let us pass to the consideration of the Law of Postliminy. By this institute not only captured persons, but captured things also, regain their former legal position. The definition of postliminy given by Hugo Grotius (aforenamed bk. 3, ch. 9, § 2) is: "The right arising in consequence of a return over that *limen*, or threshold, which is the boundary of the State." This is, however, more of a verbal description than an expression of the essential character of postliminy; and you will find in it three important defects: (1) Grotius bases the right of postliminy simply and nakedly on a "return"; when, as a matter of fact, not every return, but only a return out of captivity with the enemy, can originate a right of postliminy as its proximate and immediate cause. Accordingly, those who return from captivity with pirates or brigands, or others in a civil war, have no postliminy, as is declared by Paulus in *Dig.* 49, 15, 19, 2; and by Ulpian in *Dig.* 49, 15: 21 (1) and 24.

78 (2) Another defect is, that there are two species of postliminy: one of persons, wherein they return, and another of things, wherein they are reacquired, as is shown by Pomponius in *Dig.* 49, 15, 14, pr. Despite what Grotius says in aforenamed ch. 9, § 3, his description seems defective, as only making mention of a return, contrary to what is observed by Paulus in *Dig.* 49, 15, 19, pr.

(3) Grotius' description is also open to blame for not declaring the nature of postliminy; that is, what the right is, in itself. This is a point which certainly ought not to be omitted in definitions of political conceptions; and Paulus pays particular attention to it (place named) when he says, "Postliminy is a right of retaking from an outsider property of which we have lost possession, and of putting it back in its former condition, as established by usage and Law between ourselves and free peoples and Kings."

In truth, this description by Paulus is also defective, in its omission to 79 mention a return from true captivity, which is a prerequisite of the right of postliminy, as I just said, following Ulpian and Paulus himself. Again, the law of postliminy in general owes its origin to the usage of nations; and that which arises by Law is a special law of a particular nation. So Paulus must have meant by the word "law" to refer to the public agreements about postliminy entered into by the Romans with foreign Kings or nations.

From all these considerations, I think that postliminy in general is to be 80 defined as, "The right, introduced by the usage of nations, whereby, in virtue either of a return from a non-allied nation or of a recapture, we regain things of which we have lost the possession through capture by the enemy." Herein are three things essential to postliminy: (1) The authority of nations, which has introduced this right through usage. (2) A true captivity or detention by the enemy, either of a person or of a thing. And what has been said shows that there are three conditions here: namely, as regards the captors, that they be genuine enemies, belligerent Kings, to wit, or belligerent States, or at any rate foreigners not in alliance with us (*Dig.* 49, 15, 3, 2); as regards the person captured, that he be a citizen or man belonging to the enemy, and not to a neutral or friendly State; and as regards the manner, that the captivity be forcible and not voluntary (text in *Cod.* 8, 50, 19)—and so neither a free man who deserts nor a beaten person who has surrendered with arms in his hands has postliminy (*Dig.* 49, 15: 17 and 19 (4)), nor has one who, 81 though forcibly captured, remains thereafter with the enemy of his own free will (*Dig.* 49, 15, 20, pr.). But as regards one who has surrendered, the rule is, that if he has been received by his own people, he enjoys postliminy, otherwise not, as appears from the passage from Modestinus (*Dig.* 49, 15, 4)—a passage which is, I think, to be reconciled with *Dig.* 49, 15, 17, in the way indicated. And for this purpose I think it more probable that a tacit consent of the people is enough (by inference from *Dig.* 1, 3, 32), and one who has surrendered will be said to be kindly received if there be no contrary judgment of his King or nation whereby he is disallowed from acting as a citizen in the way in which he acted before; for it must undoubtedly be affirmed that he might lawfully be repulsed, and thereby be treated as in a worse position than one who was captured despite his resistance.

(3) Lastly, it is an essential in postliminy that there be, in the case of 82 persons, a return from captivity and, in the case of things, a recapture thereof. And Paulus (*Dig.* 49, 15, 19, 3) says that there is such a return when a

prisoner of war has reentered our territory or has come to an allied or friendly State or King.

83 This can happen to-day as a regular thing when one who has been captured by the Turks or Tartars or other barbarians has entered the territory of some Christian realm with intent to return home. For I should say that he has then returned by postliminy, seeing that the sovereigns of the Christian world are rightly deemed to be bound to one another by a law of fellowship and friendship, and ought to be held to be of milder habits in virtue of their Christianity; and, as servile captivity does not operate between them in war, who does not think it right that any fugitive from barbaric slavery who has crossed the boundaries of any Christian realm or province, with intent to return to his own people, should by the very fact and at that moment reacquire his former right of freedom? The result will be that, if he dies before reaching his own nation or country, he must be considered, in point of succession and other matters, as having been alive by virtue of the right of postliminy, and not as having died, by the fiction of the *Lex Cornelia*, at the commencement of his captivity.

84 Hence we also, at the same time, gather this, that a Christian who has returned from captivity among Christians does not enjoy, and does not need, the right of postliminy; and the reason is, that he has remained truly free and has not for any interval been in slavery. This is what is pointed to by the text in *Dig.* 49, 15, 7. This brings it about that, when a Christian dies in captivity among Christian enemies, the fiction of the *Lex Cornelia* does not operate, the basis being wanting, namely, slavery following on captivity.

85 It is a bigger question whether one who escapes from barbaric slavery to a Christian nation then at war with his own nation, has a right of postliminy. Imagine that, in the recent war, a Frenchman escaped into Spain from Turkish slavery, or *vice versa*; would postliminy operate, there being then war between Spain and France? I hold that the right of postliminy must be extended even to this case; for, although—and this might furnish room for doubt—the prisoner has not in this case escaped from slavery to a people friendly or allied to his own, yet it is enough that he has fled to a Christian people, between whom and his own people, to whose country he wishes to return, there is even during the war a community in the reception of the laws of Christianity whereby prisoners of war do not become the slaves

86 of their captors. So the refugee in question must be taken to have regained his liberty at once by the law of postliminy, from the moment he reached a people whose usages are such that, even if he were captured by them afresh, he would not become a slave. For, the requirement of the Roman Law that those who returned with postliminy should have reached either Roman territory itself or some allied and friendly King or people, was based on the fact that other Kings and peoples could capture Romans even in time of peace, with the result of a genuine slavery, and the Romans could similarly capture their men also (*Dig.* 49, 15, 5, 2).

Some one may, however, use Paulus' response in *Dig.* 49, 15, 19, 3 as an objection. At the end of that passage, Paulus gives a different explanation of the rule; namely, that the person by returning there begins then to be safe under public protection. Now, that principle seems not to square with our case. For he who escapes from barbaric slavery and reaches a hostile Christian nation, having an intent to return to his own people who then are enemies to that nation, may be captured afresh; and so he is not yet safe under public protection, and in consequence he can not be held at that time to have returned with rights of postliminy. But in truth it is enough that he is at that time safe, at any rate as regards his freedom from slavery. This is under the Law 88 of Nations which prevails among Christians. A different rule obtained in those earlier days; and the principle adduced by Paulus suited them quite well, inasmuch as in those days Romans were not safe under public protection from foreign slavery, nor even as regards their free status, before they reached Roman territory or some allied or friendly country, seeing that other peoples could reduce them again into a new slavery (*Dig.* 49, 15, 5, 2). This, however, is entirely different among Christian peoples of to-day, whether in war or in time of peace.

Let us now consider the effects of postliminy which arise on the return 89 of a person. Pomponius says generally (*Dig.* 49, 15, 5, 1), "a person who returns is restored to all his rights, just as if he had not been captured by the enemy." Hence, he recovers not only his property, but also his personal rights, such as paternal power and filiation, as it is called (*Dig.* 49, 5: 8 and 9). And I do not doubt that he recovers also his former rank. But what 90 about public offices? Certainly, if they are still vacant. But if they have been meanwhile granted to some one else by the competent authority, a different principle operates; for restoration is then impossible without injury to a third person and to the public faith, unless it chance that the office may be held by more than one at the same time without any breach of Public Law and usage, or unless the office vacated by captivity has been conferred on another person subject to a condition that the former occupant does not return from captivity, or until his return.

And, lastly, there would be another exception if the office were hereditary; for what I have said, holds good of an office which is temporary and dependent on the mere right of the magistrate, so that, when it has been granted to another during the captivity, there is no postliminy. The reason of the difference is evident; for hereditary offices confer a kind of proprietary right, to which postliminy can apply no less than to other property or rights of the captive. Accordingly, if a Prince of our Empire were to meet with the misfortune of capture by a Turkish enemy and then were to return, he would undoubtedly be reinvested with the offices which are appurtenant to the fiefs of the Empire, even though another had obtained them as presumptive heir of the blood or by fresh grant. This shows that it 92 is correct to assert, in general, that postliminy applies to fiefs, irrespective of whether, in the meanwhile, they have or have not been granted to another.

93 As regards marriage, Roman Law did not of old allow postliminy, except after a renewal of marital intent where there had not meanwhile been a marriage with any one else (*Dig.* 49, 15, 8). The reason of this rule was, that marriage was dissolved by the captivity of one of the spouses, as if he or she had become a slave; so that, if both of the spouses had been captured, the conjugal tie would not have persisted (*Dig.* 49, 15, 12, 4), and therefore, if the woman while in captivity gave birth to a child by her captive husband, the child would be reckoned illegitimate so long as the father did not return from captivity (*Dig.* 49, 15, 25; and *Cod.* 8, 50, 1).

94 To-day this does not obtain either in wars between Christians or in wars between Christians and Turks or barbarians. For in the former, personal liberty as a status remains unimpaired, so that there is no need of postliminy as regards either the bond of marriage or the legitimacy of the offspring; while in the latter, although prisoners of war become slaves, the matrimonial tie is nevertheless not destroyed thereby, (1) Because of the later constitutions of Justinian, wherein he enacted that a woman might not remarry in consequence of her husband's captivity as long as it was certain that he was alive. And the same rule was to apply, on the other hand, to a man as long as his wife, although captive, was alive (*Nov.* 22, ch. 7); but in case of doubt whether the captive spouse was still alive, although the Emperor enacted, in the same Novel, that remarriage was permitted after five years, yet in a later constitution (*Nov.* 117, ch. 10) he held that the party must wait until there was no doubt about the other party's death. As a consequence of this law of Justinian, the marriage remains in force.

(2) This is also what the Law of Nature and of Nations recommends, because of its principle that spouses ought to share in fortune of every kind, and therefore in the misfortune of captivity.

(3) There is all the less doubt on the matter nowadays, because the marriage of slaves is allowed (whole of *X.* 4, 9).

So much about the effect of postliminy consequent on the return of a person, whereby, in their turn, other parties are also restored to their rights against those who have returned from captivity.

96 Now as regards things. There is, in the first place, no doubt that postliminy applies to immovables. Pomponius clearly asserts this, *Dig.* 49, 15, 20, 1, where he says, "When the enemy is driven from our territory which they have occupied, the ownership thereof reverts in its former owners." But what happens in the case of movables is not so free from doubt. Hugo Donellus (aforenamed, ch. 21, at *nec minus*) lays down the general rule that there is postliminy in the case of things recaptured from the enemy, so that they vest by law in their former owners and do not become the property of the recaptors; in this connection the usual reference is to the text of *Cod.* 8, 50, 2.

97 It is, however, difficult to admit this opinion in general. There are some movables such as cannon and gun-wagons, transport-ships, and the like things,

to which postliminy applies (*Dig.* 49, 15, 2 (pr. and 1); *Salicet*, n. 4, on *Cod.* 8, 50, 2). All the same, the rule with regard to movables as such, is the contrary; namely, that when recaptured by the enemy they are not susceptible of postliminy. *Labeo* puts this plainly enough (*Dig.* 49, 15, 28). Paulus, indeed, seems in the same passage to dissent from *Labeo*; but his 98 remarks apply only to a special case, namely, the case of an enemy slave who is captured and then, after the making of peace, escapes to his own people, but, on a subsequent renewal of the war, is again captured. Paulus asserts that he returns by postliminy to his former master. This is also quite consistent with *Cod.* 8, 50, 2. Paulus, then, does not dissent from *Labeo* as regards the rule, but merely engrafts an exception on the rule, as he has done in other passages (see, for instance, *Dig.* 49, 15: 29 and 30).

Now, since captured enemy property belongs to the captors, and property which the enemy has antecedently captured becomes the property of the same enemy captors, why should not this, like other movable enemy property, belong to its captor, in accordance with *Dig.* 41, 1, 5, 7? This is especially plausible, because it would supply the principle of the special case in *Dig.* 49, 15, 28. For the slave who, after peace is made, escapes to his own people can not be considered as enemy property, since he has meanwhile regained his liberty; but if he be recaptured, it is as a sort of fugitive slave that he must be restored to his former owner. This is the view taken by *Cujas* (bk. 19, *Observations*, ch. 7) and by *Covarruvias* (*Relectiones* on c. *peccatum*, part 2, § 11, n. 7).

The latter, however, draws in the same place the distinction which 100 some others draw between movables which have been recaptured at once, and before they have been taken within the enemy's lines, and those which have been recaptured after an interval; although, if we consider that a thing has not yet really and effectively come into the enemy's power if it has not been brought within his lines (by inference from *Dig.* 49, 15, 5, 1), we find that there is no need of the distinction in question, since we are speaking of things that have really come into the enemy's power.

Grotius (aforenamed ch. 9, § 14) concedes to the old law that movables 101 do not revest by postliminy other than those which are of use in war—which kind of thing I referred to a little while ago—but in § 15 he adds that this distinction between different kinds of movables does not obtain in usage, since the authorities on matters of usage hold in general that movables do not revest. On this showing, postliminy, so far as things are concerned, operates nowadays only in immovables; and Grotius shows this on the authority of the Supreme Court of Paris, especially with regard to ships that have been captured and then recaptured, in which case there is no postliminy (§ 19). It is not, however, quite clear that this is the universal usage of nations.

I think it may not improbably be said that by the principles of the Law 102 of Nations there is no capture of persons and things belonging to a different nation, and no postliminy, apart from war, because of that kinship which

103 nature has established among men. Accordingly, Grotius is probably right when he conjecturally ascribes to the nomadic age that opposite custom of the old Law of Nations which was enforced by the Romans of old against foreigners, and *vice versa*, and which Pomponius tells us of in *Dig.* 49, 15, 5, 2. The usages in question remained like relics of that barbarous Law (Grotius, aforenamed ch. 9, § 18), and have not been entirely abandoned even to-day. Traces of them survive in Hungary, where, even when war is not actually being waged, Christians may capture Turks and their property, and *vice versa*. Still, I have no doubt that, between Christians, the rights of capture and of postliminy in time of peace, such as are in force between Mahometans are now obsolete. (See Grotius, whom I take to express this opinion in § 19.)

104 There is a notable result of this which deserves mention. For Christians who have been captured by Turkish sea-rovers have postliminy; and so, on the other hand, have Turks when captured by Christian sea-rovers, although the general rule with regard to sea-rovers is otherwise, according to Paulus (*Dig.* 49, 15, 19, 2) and to Ulpian (*Dig.* 49, 15, 24). There is reason in this, since such sea-rovers are under the Law of their own nation; and therefore, just as, even apart from war, any Christian may capture Turks and their property, and *vice versa*, so also may they who ply the pirate's trade. The jurists, therefore, in the texts cited, must be taken to be speaking of pirates and brigands as such, or of any collective group of men who depredate by land or by sea and who do not themselves either constitute a nation or employ the Law of any nation which is allowed to capture the men or property of another nation.

105 For the rest, I admit with Grotius (aforenamed ch. 9, § 12) that postliminy applies to conquered nations just as it does to individuals, when such a nation has been rescued from the power of the enemy by a friendly King or
106 people. In olden time, the Saguntines were in this way delivered by the Romans from the yoke of the Carthaginians and restored to liberty; and so were the Greeks from the sway of Philip: and a very recent instance of this is afforded by the people of Guelders, Oberyssel, and Utrecht, who regained their liberty by postliminy after the French occupation.

107 A last question is, Whether the right of postliminy is destroyed by prescription. I think not; for restoration to the former position under the law of postliminy must be reckoned as a merely facultative matter, which is not subject to prescription (doctors, on *Dig.* 43, 11, 2) unless something to the contrary appears from the peace which follows, or from other indications which show that the former owner has lost this right over his property.

So much about this topic.

CHAPTER XIX.

Of Truces and the Law of Armistices.

SUMMARY.

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| 1. What is a truce? | 16. There is a presumption against a limited truce, as contrasted with a general truce. |
| 2. An agreement for a truce is public in respect of its efficient cause and its subject-matter. | 17. The two <i>termini</i> of a truce, <i>a quo</i> and <i>ad quem</i> , according to Grotius. |
| 3. The varieties of truces. | 18-20. Whether, and to what extent, persons or things captured by citizens or soldiers before the publication of a truce are to be restored. |
| 4. The authority of military commanders is not enough for a truce of indefinite duration. | 21. Difference between the obligatory principle of a truce and a law. |
| 5. Otherwise with regard to a limited truce. | 22. A <i>terminus</i> of the truce, both <i>a quo</i> and <i>ad quem</i> , implied in the truce, although Grotius dissents as to the former. |
| 6. What about a truce limited in place but not in time? | 23-25. Whether, and how far, a truce binds from the time of agreement or from the time of ratification. |
| 7, 8. What is or is not lawful as regards the duration of a truce? | 26. Whether, in public acts of the Law of Nations, ratification dates back to the time when the act was done. |
| 9. How an intent of abandonment by the enemy may be ascertained, so as to legalize the occupation of vacant places during a truce. | 27. The <i>terminus ad quem</i> of a truce must be expressed either definitely or indefinitely. |
| 10. How a general armistice differs in effect from a limited truce. | 28-30. Whether, and to what extent, a truce of long duration can be agreed on without impairing its character. |
| 11. During a limited truce there is no prohibition to continue fortifications. | 31-33. Three ways in which a truce can come to an end. |
| 12. Otherwise as to bombarding or storming walls. | 34-36. A breach of a truce entitles the injured party to withdraw from it or to abide by it and claim redress for the loss caused. |
| 13. Enemy persons captured during a limited truce do not become slaves, nor does postliminy operate. | |
| 14. Whether they may be held to ransom. | |
| 15. Whether postliminy operates on property captured during a truce. | |

The end and aim of war is peace; but it is often not easy to obtain this, I because of the disagreement of the parties about matters of the highest moment. And so, in order to increase the chances of lulling war into peace, interim agreements are made for a temporary suspension of hostilities by means of a truce. This kind of agreement is commonly called, from its proper results, an Armistice, *ein Stillstand der Waffen*. Grotius (*De jure belli ac pacis*, bk. 3, ch. 21, § 1) defines a truce as "an agreement whereby there is an abstention from hostile acts for a time, although the war still continues"; and Paulus (*Dig.* 49, 15, 19, 1) writes to the like effect, saying, "when, for a short present time, the parties agree not to continue their attacks on each other." I must except, however, the reference to the shortness of the time; because, as I shall say later, that is not of the essence of a truce.

- 2 Now, the agreement mentioned is undoubtedly a public one; for it is the commanders-in-chief who make the agreement about a truce (on which ground Ulpian, *Dig.* 2, 14, 5, ranks it among public agreements), or else it is legates, or even the belligerent sovereigns in person. The underlying subject-matter is a temporary cessation of mutual hostilities. And, just as in private matters there may be an agreement not to sue on an obligation for a definite time, so also there may be an agreement for a truce as regards the right of war, the effect being that the exercise of that right is at any rate suspended, but not that the right to resort to arms after the time named in the truce is taken away.
- 3 Before proceeding to the especial topic of this part of the chapter (namely, What is and what is not permitted during a truce), we must make a somewhat detailed examination of the varieties and efficient causes of truces. Truces either regard the whole war—and these are not inaptly called unlimited, and the name “armistice” is properly applied to them—or else they regard some special business of war, such as the exchange of prisoners, burial of the dead, and suspension of the storming of a besieged town; and this kind we may call restricted. Truces of the former kind have much more important bearing on the high interests at stake, especially where they are of such considerable duration that the other side is able to prepare anew for the war with reinforced strength.
- 4 That is why, in the preceding century, Francis I, King of France, objected to a long truce; while Charles V, whose affairs at that time were in need of respite and a breathing-space, objected to a short truce as being useless to him. This being so, and the whole aspect of the war being alterable during an unlimited truce, the mere authority of a commander-in-chief is not enough to set such a truce on foot, but the consent of the sovereign or people under whose auspices the war is waged is required; for the commanders of whom I speak are ministers but not masters of the war, and so they can not, by any unseasonable agreement for a truce, deprive the Kings or peoples who appointed them to their post of any of the advantages of the war. This admits of an exception where they have been invested with free discretion to carry on the war or bring it to a halt or put an end to it, such as is said to have been formerly given to the Duke of Friedland by the Emperor Frederick II, or where the King or people subsequently ratifies the kind of truce in question.
- 5 The law with regard to restricted truces is different. They are not of the same weight; for a grant of two or three days' interval in which a besieged town may deliberate about surrender, is nothing like so important as an unlimited truce. Accordingly, the authority of a commander is enough to create this less serious kind of truce.
- 6 And it is clear that even if a truce applies to only a certain province or more important town, but is unlimited in point of time, it belongs to the former kind, and this because of the like prejudice and influence which it brings to bear on the fortunes at stake in the war. There would have been

an instance of this (had it been thought expedient to grant it) in the truce in respect of the diocese of Utrecht which the French governor there is said to have demanded, as a kind of neutrality, not only from the commander-in-chief but also from the Estates of the Belgian Confederation.

Now what has been said justifies the assertion that commanders can not, without authority from above, agree on an unlimited truce or anything analogous to it when it would be hurtful to their King or State; but that they can do so when it would be advantageous, because the consent of the King or State that would be profited by such a relaxation or interval in the war is presumed to be there, and to be expressed by the mouth and authority of the commander in such matters as are favorable and profitable. Accordingly, a truce so made will not be null.

This being premised, the rule about what is or is not meanwhile permissible, which is to be derived from the definition of a truce, is, of course, that acts of hostility, whether against persons or against things, are unlawful, while other acts are permitted (Grotius, aforenamed ch. 21, § 6). And this, in case of doubt, applies both to hostile ruses and to hostile acts; for, as a just war, according to what was said in the preceding chapter, gives the right to injure the enemy alike by craft and by violence, so a truce suspends this right with regard to both kinds of hurt. Accordingly, in time of truce it is no more permissible to capture an enemy's position by corrupting the garrison than to storm it by open force (Grotius, place named, § 8).

Is it, then, allowed to seize a position which the enemy has meanwhile abandoned? Yes, if it has been really abandoned; otherwise not. (Grotius, aforenamed § 8, where he shows, on the authority of Procopius, *De bello Gothicō*, bk. 2, that Belisarius seized cities of the Goths during a truce, on a pretext of their having been abandoned.)

But what facts entitle us to presume such abandonment? If the enemy 9 has quitted the whole neighboring district, and has clearly deserted this or that position, and especially if, as the French did in Liège in the last war, he has demolished the fortifications—that would be conclusive evidence of an intent to abandon. If, then, there be these or similar circumstances, it will not be wrong to occupy, even during a truce, those places which the enemy has deserted.

Of course, the distinction drawn above between different kinds of truce 10 must be applied here; for a general armistice or unlimited truce causes a cessation from all kinds of hostile act, while a restricted truce does not operate outside the limits of the agreement. Hence, a truce granted to a besieged town does not prevent the interception of reinforcements and provisions, and the capture or killing of other enemy forces, under the law of war, even during that truce so granted to the town; that is, its garrison only is to be spared, during the truce and within the bounds of the place they are defending. (Add Grotius, aforenamed ch. 21, § 8.)

11 Now, can siege-works be continued on both sides, by the besieged for purposes of defense, and by the besiegers for the purposes of attack? I think that, first of all, we must look at what the parties agreed on, and observe it; but if the point is not clearly settled in this way, then it ought to be held allowable to continue siege-works during the truce, on the ground that it is allowable to go on preparing for war, to enrol soldiers, and to bring them into camp, and therefore that the besiegers may extend fosses and construct ramparts and lay mines, while the besieged in their turn may, during the truce, repair their walls or carry out new defenses against the besiegers, these and such-like acts being only preparatory for future attack or defense.

12 But to bombard the walls, or to scale them, to blow up towers, or to do any of the hurtful things which enemies do in the actual course of fighting, is not lawful unless there has been an express reservation thereof in the truce, such hostile acts as these being, in themselves and directly, repugnant to the nature of a truce.

13 It follows, then, that persons captured during a general or unlimited truce do not become the slaves of the enemy captor; and so there is no postliminy. This is doubtless what Paulus had in mind in *Dig.* 49, 15, 19, 1, as Grotius (aforenamed ch. 21, § 6) rightly thinks. For the passage in question is not to be interpreted to mean that the jurist thinks a truce takes away from prisoners of war the right of escaping to their own side; for that is counter to the Law of Nations, and a truce calls a halt only to the right of doing hostile hurt, and not to the right to reclaim liberty. So the former interpretation is altogether the sounder one.

14 Further, persons captured during a truce are not held to ransom by the enemy; and if, despite this, anything be extorted from them, it is mere matter of fact and not authorized by the Law of Nations. In saying this, I refer to the enemy themselves, and not to any third person who ransoms a *de facto* prisoner with his own money, especially where the prisoner consents to such ransom; for in such a case it will not be improper for him to claim the repayment of that sum, although an enemy could not lawfully exact it. The ransomer is, indeed, the prisoner's *negotiorum gestor*, or rather the consenting prisoner's mandatary, and therefore has a good cause of action.

15 Similarly, there is no postliminy in the case of property captured during a general armistice, since the truce prevents the enemy acquiring the ownership therein. This principle also has the result that, if the thing be subsequently recaptured from the enemy by the other side, it does not go as booty, but should be restored to its former owner.

16 As regards a limited truce, it is wrong to capture a person or a thing of the enemy, if this be included in the terms of the truce. Accordingly, if the truce be general, the presumption is in favor of the party who alleges that the capture is a wrong to him; while, if the truce be restricted, this is not so, unless it is clear or is shown that the person or thing captured is of such a kind as to be within the tenor of the agreement; for example, unless it be clear

or is shown that the captured person is one of the garrison, whom it would be wrong for the besiegers to capture, because of the truce; and so in like cases.

Let us now deal with the time of a truce. This is included within two ¹⁷ *termini*, a *terminus a quo* and a *terminus ad quem*. The former, so far as concerns the contracting parties, is the day when the agreement is made; but, so far as concerns their subjects, it is, according to Grotius, the day when the truce is published (aforenamed ch. 21, § 5).

Now, if this opinion holds with regard to subjects indiscriminately, it ¹⁸ follows that whatever hostile acts be done by the subjects or troops in the intervening time between the making and the publishing of the agreement for a truce, are not taken as breaches of the truce; and therefore anything that is meanwhile captured becomes the property of the captor and is not liable to restitution in virtue of the subsequent publication of the truce, unless it be otherwise agreed. Yet Grotius (place named) thinks that the contracting parties are bound to make good any damage they have done. This does not seem to me in accord with the hypothesis. For they who make a truce with one another do not make any promise or bind themselves outside the contents of the truce, unless they insert an express provision to this effect. Now, according to Grotius, it is within the contents of the truce that the subjects or troops are not bound before its publication; and therefore any hostilities committed by them in the intermediate time will be lawful, and neither they nor any others on their behalf will be under any liability therefor. Undoubtedly an exception must be made where there has been an express agreement to the contrary. And by this I do not only refer to the case where the contracting parties have formally promised one another to make good any loss caused after the agreement for a truce, but also to the case where they have fixed the time of the agreement as the *terminus a quo*; that is, as the date from which the agreed-on truce is to have force and validity.

Further, where the other side is dilatory (*in mora*) in publishing the truce, it is quite right that he should be held bound to make good any loss that thence arises, even if we assume that his subjects indiscriminately are not bound to observe the truce before its publication. Grotius, indeed (aforenamed § 5), would do no more than exempt from penalty those who committed hostilities in that intermediate time; and he is silent about captured persons or things. What I have said is, however, a corollary of Grotius' proposition; for if a truce does not forthwith bind the subjects before publication, it follows that, so far as they are concerned, the activities of the war are not suspended, but they may capture enemy persons and property just as before.

But I fear that this opinion will not stand, for Kings and Princes and ²⁰ similar wielders of power make the truce on public account, in such a way that individual citizens and subjects and soldiers are taken to have made the truce through the mouth of their King. And so they are in this event no less bound from the date of the agreement for the truce than if they had made it with

their own mouth. For what the civil authority does in public matters is taken to have been done representatively by the individual citizens. And so I think it the sounder opinion that the subjects also are bound to abstain from hostilities from the date of the agreement for a truce; although, if they commit any before the publication of the truce, they do not incur the penalty for breach of the truce or any other penalty, because of the presumption of their ignorance thereof. And so anything meanwhile captured must be restored, or the value exacted from the captor so far as a profit has been made of it. If, however, it has been *bona fide* consumed, the private person concerned is under no liability to make restitution, for this would savor of a penalty; but restitution should be made on public account, as in the cases mentioned by me a little while ago.

21 This shows that a law and a truce differ in principle as regards the obligation of the subject, although Grotius inclines to the opposite view (aforenamed § 5); for a law does not bind the subject until it is promulgated, while a truce does bind before its publication, at any rate in the way just named. The reason of this difference is in the different intent of the lawgiver and of the maker of a truce. The former does not propose to bind his citizens except by a manifest and promulgated law, it being absurd that they should live under rules that they are ignorant of; and any such absurdity is not to be presumed in the lawgiver. But the contracting party to a truce binds his subjects, even though they be ignorant, by the interposition of the public faith, so that either they are not to commit any acts of hostility after the agreement for a truce, or restitution is to be made for any hostile act they may commit, on good and fair principles and in accordance with the nature of the act.

22 I ask whether a *terminus* of a truce is included within the truce. Grotius (aforenamed ch. 1, § 4) says Yes as regards a *terminus ad quem*, out of favorable regard for truces, whereby slaughter and the shedding of human blood are abstained from; but he says No as regards a *terminus a quo*. The latter part of his answer he bases on the significatory force of the preposition "*a*," which is disjunctive and not conjunctive. But in this case, too, the same principle of favorable regard should operate, despite the signification of the words; and therefore our answer must be that, just as in the case of a *terminus ad quem*, so, in the case of a *terminus a quo*, the *terminus* is implied in the truce, as Pufendorf (*De jure naturæ et gentium*, bk. 8, ch. 7, § 8) rightly maintains against Grotius.

You will say that this is a superfluous question, seeing that it has already been demonstrated that a truce binds from the day of the agreement. My answer is, that the import of the words "from the day of the agreement" is left in doubt; namely, whether they do or do not include the day itself. This is the point which is settled by the other question.

23 I ask, further, whether a truce binds from the time when the commanders agree about it or from the time when the King or State ratifies it.

If the truce be one which, in accordance with the distinction drawn above, it is within the competence of the commanders to make, I do not doubt that it binds from the time of the agreement, because any subsequent ratification by the King or people is not essential, however desirable; and it is the same when free discretion has been allowed to the commander, so that he can enter into even unlimited truces and truces of long duration. But when the truce is one which, having regard to its quality and the extent of the commander's commission, depends on ratification, two cases must be considered.

In the first place, it may have been expressly agreed that the truce must 24 be taken to operate from the time of the agreement. And then hostilities ought to cease from that *terminus* and this not only when the ratifying party makes express mention thereof, but also when it has been expressly so agreed between the parties to the agreement. There is reason in this, because a general ratification covers all the points of the truce, and therefore covers the point about the *terminus a quo*, it being all the same whether the ratifying King or people declares in a set form of words that a truce which has been entered into in the hope of ratification binds at once from the day of agreement, or by its ratification approves of the same point which was previously expressed in the truce.

Then, on the other hand, there may be nothing at all said on this topic. 25 In this case the truce, by the Law of Nations only takes effect from the time of ratification, so that any acts of hostility committed in the interval between the agreement and the ratification ought not to be undone, and captures then made need not be restored; for the rule elsewhere employed, that a ratification dates back to the time of the act that is ratified, is an institute of the Civil Law, as appears from *Cod. 5, 16, 25*; and *4, 28, 25, pr.*, but not of the Law of Nations.

All the same, the retroactive effect of a ratification might be upheld here, 26 on the ground of the tacit intent of the parties, as where they are wont on both sides to follow the Civil Law, and to draw from it their principles of interpreting public acts also, so that in doubt they would seem to have looked to the Civil Law with regard to the *terminus a quo* of the truce. But this can only be so laid down when it is quite manifest.

The *terminus ad quem* of a truce is that day, month, etc., up to which it 27 is agreed that the truce shall last. It is, therefore, necessary as a general rule to express the *terminus ad quem*, though not the *terminus a quo*, because the latter is tacitly indicated by the time of the agreement, while the former does not depend on any similar conjecture as to intent. Since, then, a truce, in accordance with what I said before, is essentially temporary, a *terminus ad quem* ought certainly to be deliberately expressed by the contracting parties, for it is not proper to find one by means of conjecture and presumption. Here, however, it must be noted that the expression *terminus ad quem* of a truce has two meanings. It may be determinate, as up to such and such a day, month, year, etc.; or indeterminate, as in an armistice for negotiating about

peace, which ordinarily lasts up to the end of the negotiations and then either changes into peace or returns to war. In this case, indeed, it seems that a *terminus ad quem* can be tacitly understood or implied, if it be clear that the truce is expressly made for the purpose of peace-negotiations; for, as long as these continue as the cause of the truce, the likelihood is that the parties meant the armistice or truce also to endure.

28 Here the question arises, Whether a truce can be agreed on for a long time, say ten or twenty years, etc. It would seem not, according to the jurist Paulus, in *Dig.* 50, 17, 35, where he speaks of a truce as being an agreement lasting for the present and for a short time. But in truth, examples are not wanting of truces granted for long periods; Grotius (aforenamed ch. 21, beginning) and Pufendorf (aforenamed ch. 7, § 4) give some from Livy 29 and Dionysius Halicarnassus and Diodorus Siculus. Grotius, indeed, finds fault with Paulus' description in this particular, saying—and if we are speaking of the Law of Nations, he is quite right—that a truce is not necessarily limited to a brief period of time. And examples of truces made nowadays for long periods show this.

Yet here I should say that, if a truce contemplates a duration of a hundred years or more, it takes on the nature of a peace, as when Romulus granted the people of Veii a truce for a hundred years (Livy, *History*, bk. 1). For it is absurd and harmful to mankind to rake up causes of war that are a whole century or many centuries old. In the Bible, Jephtha raised this objection to the King of the Ammonites (*Judges*, ch. 11, vv. 26, 27).

30 I hold the same view even if the time appointed for the truce be less than a hundred years, the period being so long as to exceed in all likelihood the bounds of the life of the belligerents, according to the ordinary limitations of men. And I do not think it probable that the parties then coming to an agreement for a truce intended to put an end by time to the causes of war so far as they were themselves concerned, and yet to leave them to their descendants. Accordingly, when a truce is made for a very long time between Turks and Christians, the force of it is that the Turks are not to make war afresh save on new grounds, or at any rate on new pretexts, as if the right of the former war was put an end to by a very lengthy truce of this kind.

31 It remains to consider briefly the ways of ending a truce. There are three: lapse of the agreed-on time, a contrary agreement, and breach by the other side. As soon, then, as the time named for the truce has expired, fighting can begin again without any new declaration of war, the right of war not being waived by the truce, but only suspended for a time. Hence, in the year 1638 the Hessians followed the Law of Nations, and were not to be blamed because, after the lapse of the period of the truce and at the very moment, as it were, of its expiry, as in censorious manner Wassenberg puts it (*De bello Franc.*, p. 500, my copy), they entered Westphalia under arms and stormed Paderborn and Camins.

A contrary agreement of the parties interrupts and puts an end to a truce 32 which still has some time to run; for, as an armistice is introduced by a pact, it ought also to be ended by a contrary pact (by inference from *Dig.* 43, 24, 20, 2).

Lastly, a breach of a truce gives a very just cause to the other and injured 33 party to withdraw from the agreed-on truce, according to the common saying, "Faith is not kept with one who does not keep faith." And so the Romans were no longer bound in Africa by the truce, because of the attack on their ships by the Carthaginians during the truce; and Publius Cornelius Scipio, accordingly, when later on approached on the subject of peace by the Carthaginian ambassadors, said, "That he would grant a truce if the transports taken during the former truce and everything that was in them were restored, but that otherwise there would be no truce nor any hope of peace."

It all depends, then, on the discretion of the injured party, according as 34 he does or does not wish the truce to continue despite the breach. If he chooses the former course, the party breaking the truce will doubtless remain bound by it, and what he has done further in breach of it is to be reckoned an illicit contravention and not as right and permitted; for a breach of a truce does not give a right to break it, but, as said, a choice to the injured party.

If, however, the injured party chooses the latter of the two named 35 courses and recommences the war, the truce is reckoned broken by both sides, each side having, by words or deeds, declared its intent to withdraw from the truce. And, although the contravening party may not rightly begin the new resort to arms because of the illicit breach, whereby he is bound to submit to all the loss which flows from that adverse act, yet, by reason of the subsequent choice of the other party, he may afterwards be entitled, other things being equal, to take up the war again, on the principle that the violent acts previously done by him are purged by the more recent agreement and consent of the other party, and that thenceforward no such remain, according to Paulus (*Dig.* 43, 24, 20, 2).

So much on the topic of this chapter.

CHAPTER XX.

Of Peace and the Mediators of Peace.

SUMMARY.

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| 1. Peace more in harmony with man's nature than war.
2. In time of war efforts to be made to restore peace.
3, 4. Two meanings of peace.
5. Barbarous and contrary to Law of Nations to capture men of the other side in time of peace, except by way of reprisals.
6. Definition of peace.
7-10. Who have, and who have not, the power of making peace.
11. Difference, according as peace exists merely in virtue of an agreement or by force of Law.
12. Instrument of Peace of Osnabrück and Münster operates in both ways, from different points of view.
13-15. Consent of a minor King to a peace binds him, without any right of rescission; and an infant and a mad King, too, if deliberated on by his ministers and approved by his guardians.
16, 17. Whether a captive King can make a peace.
18-21. Whether, and to what extent, an exiled King or Prince can make a peace by the Law of Nations.
22, 23, 25-27. Whether a King or Prince can alienate crown property to obtain peace.
24. The possessor of a majorat is not a mere usufructuary.
28. Whether a King or Prince can alienate his subjects' property to obtain peace.
29, 30. Whether, and to what extent, a province or part of a kingdom can be severed from the rest of the civic body for the purpose of obtaining peace. | 31-33. Whether in treaties of peace, rights availing against a vassal can be transferred to another without the vassal's knowledge or against his will?
34, 35. Whether subjects may be alienated for the sake of peace, against their will.
36. From what time a peace binds.
37, 38. The date up to which a peace is to continue can not be fixed without altering the character of the peace.
39, 40. How far the interpretation of a peace is restrictive or extensive.
41-43. How far the right of interpreting a peace belongs to all the parties to it.
44-49. Whether a pacification involves, of itself, the restoration of the former state of things; and what about the authors of the war? and captives? and deserters?
50. What kind of person may be a mediator of a peace? Requisites of a mediator.
51. Two requirements of a properly constituted mediation.
52-54. Mediation may be refused under the Law of Nations. Why?
55. Consent to a mediation can not be compelled under the Law of Nations.
56. The officials of a mediator can be rejected for good cause.
57. Especially usual for mediating Republics to conduct a mediation through officials.
58. The duty of a mediator described.
59, 60. Whether the decree of a mediator about the rejection of peace furnishes a just cause of war.
61. A mediation is rendered suspect if the business be protracted.
62. What comes under the word <i>treuga?</i> |
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I Mankind lives either in peace or at war. The former condition best befits man's nature, and is most consistent with the principle laid down by Florentinus (*Dig.* I, I, 3), that it is wrong for man to prey on man. And justice requires that this rule should prevail, not only between individual men or the citizens of the same State, but also and especially between Kings and between peoples. The latter condition, of war, is a very disastrous one, and in a measure is opposed to the Law of Nature; but it is lawful under the custom

of nations to depart from that Law in this particular, if there be good cause, and if a friendly arrangement can not be arrived at. On this point, later on.

Accordingly, after Kings and nations have withdrawn from this law, 2 which forbids them because of their natural kinship to do each other hurt, and have duly declared war, they should use their best endeavors to return to their former condition by means of a public agreement by which the wrongs done, and the causes of the war, are wiped out. This is the making of a peace; and the services of mediators often conduce to this highly desirable result.

It is now apparent that "peace" has two meanings. (1) It is used by 3 that bond of natural kinship between men by means of which man is bound to man and nation to nation, to render the common services of humanity and, before all, to abstain from violent acts. In this sense, peace comes from a simple dictate of Right Reason, and prevails among those nations who have not broken up that former condition of natural kinship by war, even although their public dealings with one another have not always been innocuous, as often happens when these dealings are in remote parts of the world and where the parties are at great distances from one another. There is a passage in Sallust's *Jugurthine War* which is relevant here; it is where the author tells us about Bochus, King of Mauretania: "The ruler of the Moors was King Bochus, of whom, save the name only, the Roman people knew nothing, and of whom we had never before heard either in peace or in war." And we can say the same thing to-day for the Germans as regards the Persians, Indians, and other orientals.

(2) The word "peace" is properly employed of the public agreement 4 which puts an end to a war, or rather of the condition of safety which follows on such an agreement. That is the sense in which we here use the word. And an important consequence of this use must be pointed out: for peace in the former sense does not, as said above, absolutely prevent a right of capture and of postliminy, by usage of nations; but peace in the latter sense does, as Pomponius says (*Dig.* 49, 15, 5, 2).

Therefore, the practice of certain peoples, like the Turks and the 5 Tartars, to go on capturing and enslaving enemy subjects although peace has been duly agreed on, must be held barbarous and a breach of the Law of Nations; for the pacification takes away this right, and anything contrary to the pacification is a breach of the Law of Nations. But of course, if their war is with a Christian power, we on our side may rightly retaliate under the Law of Nations. Grotius, indeed (passage cited in preceding chapter), ascribes such a capture in time of peace, even using the word "peace" in the former of our two senses, to the age of the nomads rather than to the Law of Nations. Still, it is more tolerable in a peace, where the word has the former meaning; for any one has only himself to thank if he enters the territory of an unknown people, for it might well imagine his motive to be treason or the spying out of the secrets of that foreign realm. This is the reason

which the Emperor Justinian adopts elsewhere for not allowing foreign merchants to enter Roman territory (*Cod.* 4, 63, 4). But a person who is captured in spite of a public agreement for peace, is manifestly outraged, seeing that he ought to be perfectly safe under the Law of his own country; and it is especially outrageous where he has been captured in a raid and foray made by another people, such as the Turks are said to be fond of making.

6 This makes it easy to see that the definition of peace, properly so called, should run as follows: *Peace is a condition of mutual public security established by a pact between Kings and Princes and Peoples.* And the essential requirements of peace are in consequence two: (1) the public power of those who form this pact; and (2) the consent to that mutual security which the contracting parties and their citizens and subjects, with all their property, are to enjoy.

7 The persons who have the power to make peace are the same as those who, as such, have power to make war of the non-private kind. Accordingly, Kings and Princes and States which do not recognize any superior can, of their own right, make peace just as they can make war; but those who are only magistrates, however ample their powers and dignified their position, can not arrange a peace without a commission or order from their King or other superior. Thus, in olden days, the Roman consuls could not make peace with the enemy, save by a command of the people; and if the people had given no such command, the peace did not bind the Republic without ratification. That in the absence of a ratification the peace was void, was illustrated by the Peace of Caudium, which the consuls Spurius Postumius and Titus Veturius entered into without a command from the people.

8 So also, at the present day, the Spanish viceroys and Venetian and Genoese provincial governors (as they are called), and similar Dukes and Princes who are such in dignity only, and not in power, have no discretion to make peace without a mandate or commission; and indeed all those considerations which I set out above with regard to personality in making war, apply to this topic of peace.

9 Accordingly, although feudal vassals recognize a suzerain, they have a discretion to make peace, in virtue of their having a right to make war. Such feudatories are the Kings of Spain, with regard to the Kingdom of Sicily and Naples; a little previously, the Dukes of Milan; and at the present day, the Dukes of Florence and Savoy, and other Princes in Italy who hold fiefs as vassals either of the Emperor or of the Pope. There are many more instances of this; and especially, in the preceding century, the Italian Dukes on various occasions ended war by making a peace. One of the specially notable instances was the Peace of Constance, made in the time of the Emperor Frederick I with the States of Lombardy. Another important instance is afforded by the Germanic Peace of Osnabrück and Münster.

10 This shows that the Princes of Germany have the power to make peace, because in those pacifications they were treated as allies either of the Emperor or of the Kingdom of France or of Sweden.

Now, the making of a public peace, alike in matters spiritual and in 11 matters temporal, should not be treated as a mere making of a contract, seeing that it is in the nature of positive and fundamental Law. And here no slight distinction arises: for a pacification, when regarded as an agreement under the Law of Nations, does not remove the possibility of future war, that being still permissible if a good cause supervene, as will be shown hereafter; but the case is quite different when a peace is constituted by common consent in legislative fashion, for Statute Law is particularly concerned with future affairs. The Princes of our Empire, therefore, if their mutual relations be strictly scanned, ought not to settle their differences with one another by force and arms, but by friendly methods or by judicial process, whether the dispute be an old one or have arisen since the establishment of the penal sanctions mentioned; contrary conduct would fall within the penalty for infringement of the peace, in accordance with the letter of the Instrument of Peace (art. 17, § *et nulli omnino*).

Defense being, however, a right of the Law of Nature, it must not be 12 deemed to be barred hereby. The Instrument of Germanic Peace operates with the force of a pact under the Law of Nations, so far as concerns the Emperor and foreign Kings and their allies, wiping out all kinds of cause of war and restoring public quiet on the basis of mutual agreement; while it operates with the force of Statute Law so far as concerns matters internal to the Empire, containing various provisions for the judicial settlement of any such controversies (see art. 12, § *pro maiore*), a topic on which I have dis- cussed at length in private lectures on Public Law.

Some questions are asked about a consent given to a peace:

13

(1) Whether it binds a minor King. Certainly it does, if we speak of a minor who has now attained majority; he can not claim *restitutio in integrum* to the state of war by alleging some injury done to him in the treaty of peace, both because such public matters as these are settled by the riper judgment of his counsellors (so that the alleged over-reaching is improbable) and also because war is subject to hazards and mischances, and the wrongs done in war are wiped out by a peace in such sort that *restitutio* to a state which brings such ills to mankind is out of the question (see the words of *Dig.* 4, 4, 7 (7 and 8)).

A more serious question arises when the King is still a minor. Grotius 14 (*De jure belli ac pacis*, bk. 3, ch. 20, § 3) says of him that he can not make a peace. His somewhat general remarks about the age of a King who lacks ripeness of judgment can not be extended to one who is above the age of infancy, taking infancy, in accordance with the Civil Law, to end with the seventh year (*Cod.* 6, 30, 18, pr.). In my view, however, even in such a case the treaty that is made would be effective if it had been considered and entered on not only by the King but also by his guardians and ministers; for, 15 just as in private matters a ward may be bound by a contract duly entered into by his guardian, so and much more is it in public matters where a King is a

minor or of unripe judgment. This is emphasized by the consideration of the importance to mankind of a peace not being in such a case suspended (to the public hurt of the peoples affected) until the King or Prince attains riper years. Why, the present King of France, Louis XIV, was barely over ten years old when the Peace of Münster between the Emperor Ferdinand III and himself was concluded.

Our answer must be the same in the case of a mad or mentally defective King: the interim acts of the administrators of the kingdom, both in peace and in war, must be deemed binding, on like considerations of public expediency.

- 16 (2) Another question is about a captive King: Can he make peace? Grotius (place named) gives the same negative answer as in the case of a boy King, provided the kingdom is based on popular assent and it may be presumed, therefore, that there was no intent on the part of the people to demit the exercise of their sovereignty even to one who was not free. Undoubtedly, in the case of Francis I, the captive King of France, it was expressly agreed in the peace-negotiations with Charles V that the King should be freed from confinement and confirm the articles of peace while at liberty. And the Dauphin did this on attaining the age of fourteen, and the Estates of France did it at once, thus tacitly showing that the promise of a captive King was not enough. This I hold to be true of every kind of kingdom, without any reference to the distinction drawn by Grotius; for a King who has been captured by the enemy, has lost his administrative power and therefore, by reason of his condition, can not make any arrangement or provision about the affairs of his realm, though King Francis did indeed desire that during his captivity he should not be treated as dead by the French, as regarded the administration of his realm.

What has been said holds good when the capture of the King has not been accompanied by the overthrow of his kingdom; for if both King and kingdom have fallen into the power of the enemy, there remains no question of making peace. The King who is in such a plight has utterly lost all regal rights, as is illustrated in Roman history by the cases of Kings Jugurtha, Syphax, and Perseus.

- 18 (3) Another question is, Whether a King retains the power of making peace when he is in exile. Grotius (place named) distinguishes according as the King continues or not to live in exile. In the former case he likens the exiled King to a captive King, and therefore tacitly agrees that he has not the right to make peace; while in the latter case he gives an affirmative answer. My view, as above in connection with war, is that a distinction must be drawn according as the banished monarch has lost his sovereign rights for some wrong-doing, or has retained them because it is some unjust cause that has driven him into exile, such as insurrection, usurpation, or hostile force. In the former case I maintain that the exiled King has no right to make a peace; and therefore Tarquinus Superbus, while in banishment for his crimes and

treating with King Porsenna of Etruria, could not make a peace with the enemies of the Romans which would be valid by the Law of Nations. In the latter case I give an affirmative answer; for, although a King or Prince, while exiled, has no greater actual administration of his realm than while captive, yet a difference emerges as regards the right to administer. A captive monarch loses this right by his captivity; but an exiled monarch does not lose it when the cause of his exile is unjust, as, for instance, insurrection or usurpation. Herein lies the whole force of the question; for if, for example, the 20 present King of Britain had made a peace with the Dutch during his exile, he could have bound his British subjects to an observance of the peace, even although they were in point of fact so much under the yoke of the usurper Cromwell that they would not obey the King at that time. The public acts to which regard is to be paid are those of Kings and not those of usurpers, as the consul Quintius says in Livy's *History* when making objection to Nabis, the usurper of Sparta.

But you will ask, Of what use is such a pacification as this, if the people 21 or rebel estates reject the authority of the exiled King? Even so it would not be without effect: firstly, because the rebel estates or subjects are actually bound by what has been done, and if they yield no obedience to it, they act counter to their obligation, for in questions of the Law of Nations right must always be distinguished from mere fact; and, secondly, there is a hope of restoration, and if that were fulfilled, not only would the restored monarch be bound by the preceding peace as from the time of its being made, but his people also would be retrospectively bound thereby with practical effect, at any rate from the time when the peace in question was publicly known, and therefore any things that had been captured in the interval must be restored just as if the peace had been made by a King actually in possession of the administration.

(4) Another question is, Whether a King or a Prince can alienate crown 22 property in the interests of a public peace. I say Yes undoubtedly, in the case of a patrimonial kingdom; but there are some who take a contrary view in the case of a non-patrimonial kingdom. Among these is Grotius (ch. 20, § 5). He relies on the presumed intent of the people at the time when the kingdom was made over to the King in a sort of usufruct; and elsewhere (bk. 2, ch. 6, § 8) he holds that neither public expediency nor necessity constitute an exception to the rule forbidding alienation of the kingdom or any part of it. Still, the opposite view may be defended by the matters adduced by 23 Romanus (cons. 332, n. 13, onwards) and Corsetti (*De privilegio pacis*, n. 244) in support of the proposition that rights are relaxed in the interests of peace and that, the public interest being here at stake, an alienation of property, which otherwise would not be permitted, is permitted in the interests of peace, as Gabrielis expressly says (*De jure quæs. non toll.*, qu. 8, lim. 5). And this does not lack the support of a presumption as to the intent of the people or estates; for these must be presumed to have made their grant

of regal rights subject to the supreme law of public safety. Now, this safety is at stake in this matter of the alienation of part of the kingdom in the interests of peace; and therefore in this case a presumption concerning the intent of the estates or people must be resorted to. Indeed, the comparison of regal rights with usufruct in the case of a non-patrimonial kingdom is clearly open to adverse criticism, since, even in private matters, it often happens that a true owner may in certain circumstances not alienate his own property, and yet his right is undeniably ampler than that of a usufructuary which ends with his life.

24 In this connection it is relevant to point out that the possessor of a majorat (an entailed estate) is during his life a true owner, and not a mere usufructuary; this is maintained by Molina (*De primogenitorum origine*, bk. 1, ch. 19, n. 4, onwards), by Gutierrez (*Practicæ questiones* 17, n. 2), and by Marius Giurba (*Observationes decise tribunalium Siciliae*, 69, nn. 37, 40). Now, a King even in a non-patrimonial kingdom, especially in a successive one, is, by usage of nations, in the position of the possessor of a majorat. For kingdoms pass as a rule to the eldest son; and although, in an elective kingdom, there is no devolution in favor of sons or other blood-relations, still the royal right is essentially the same, and therefore an elective King is a true owner of his kingdom just as the King of a successive non-patrimonial kingdom is. Why, then, in the interests of the public, may he not alienate part of what it is forbidden to alienate, exactly as a private owner may, for the same reason, do the same thing with regard to property the alienation of which is forbidden by Law (*Nov.* 37, ch. 1, and *Authentica, Res quæ* (*Cod.* 6, 43))?

25 I think, however, that when all is well weighed a distinction must be drawn according as a King, in this business of making peace and of the alienation of a part of his kingdom in the interests of a peace, is or is not expressly bound to obtain the assent of the people or estates. In the former event his act of alienation would be invalid without the coöperation of the people or estates, because of want of power and due alienatory formalities. But in the latter event a further distinction should be drawn. On the one hand there may be a very pressing reason for making peace, it being obvious that the State would, or might easily be made to, sustain more hurt by a continuance of the war than by the voluntary alienation, in order to secure peace, of some parts or cities or provinces, etc.; the existence of this urgency could be gathered from the nature of the impending dangers and the strength of the foe, especially where that foe has also a just cause. Or, else, on the other hand, there is no such pressing and urgent cause for obtaining peace by an alienation of a part of the realm.

26 In the former event I think that the King, who as a rule is restrained from alienation, may nevertheless alienate some part of his realm as the price of peace, on a strong presumption as to the intent of the people or estates. The principle is, that royal power is given to him with a presumable condi-

tion that he administers the State in all respects in the best way; now this is, on our hypothesis, the best way of administration, and therefore the King is allowed to alienate. And they are indeed ill counsellors in public matters who would avoid a loss of part by exposing the whole to manifest dangers; there are times when the best advice is to yield to the necessities of the occasion, even though this involves some loss to the State. It is of course safer, in any such case of doubt, that a detailed pacification should be entered into with the assent of the people or estates, as was the case in the peace between Charles V and Francis I of France, and in the Germanic Peace of Osnabrück and Münster, although in the former case the peace was not carried into execution.

In the latter of the two events named above, I agree with Grotius; for a 27 King is ill-advised in the exercise of his royal functions if, when better fortune may be hoped for and his affairs are not desperate, he purchases or accepts peace at the price of hurt to part of his kingdom.

(5) A further question is, Whether a King, in order to obtain peace, 28 may alienate the property of his subjects. My answer is: Yes, if the necessary peace can not otherwise be attained. This rests on the basis of "eminent domain." Equity, however, requires that the loss sustained by those whose property has been taken should be made good at public expense; and if compensation or redress can not be tendered at once, it must be tendered as opportunity offers (Vasquez, bk. 1, contr. 5; Grotius, place named, ch. 20, § 7).

(6) And what about consent in the case where, in order to obtain peace, 29 a member has to be severed from the body and alienated: is the consent of the whole body required for the alienation? According to Grotius (ch. 20, § 7), both the consent of the part or province which is to be alienated (that is, of its people or of the estates which represent it) and also the consent of the whole body, is required. This opinion has at any rate the justification that the part to be alienated is affected by the new condition of subjection, and that the whole body is affected by the consequent weakening of its power. But it can be admitted only if there has been no adverse modification of the 30 position of the part to be alienated, so that it is from a position of quasi-liberty, at least, that it proposes to be transferred to a condition of subjection, but not where it has already been conquered or reduced to subjection and there is nothing left for the victor to demand except a contractual abdication, by the whole body, of its previous rights; in this latter case the better opinion is, that the consent of the already servient part which is to be alienated is not required. In this connection we have the instance of Regulus, given by Cicero (*Offices*, bk. 2); he refused to record his opinion in the Roman Senate on the ground that, as long as he was bound by oath to the enemy, he could not be reckoned a true Senator. In the same way, provinces which have surrendered to the enemy or have been reduced by arms can not make their wishes heard so long as they continue in their present state of subjection.

- 31 (7) I next ask, Whether, in a treaty of peace, a lord may alienate his rights over his vassal against the latter's will. There was in olden days a great controversy on this point between the King of France and the Duke of Bretagne, the former proposing to cede his rights over the latter, who was his vassal, to the King of England as one of the terms of a peace. Azo was consulted on the matter, and he gave his opinion in favor of the Duke, and therefore in the negative, as Nevizanus, following others, says, in Brunus, *Consilia feudalia*, vol. 1, cons. 12, n. 109.) The same view was taken by Igneus (*Repetitiones* on *Cod.* 5, 16, 26) and by others mentioned by Nevizanus.
- 32 The basis of this negative opinion is sound from the viewpoint of Feudal Law, which reckons lord and vassal to be equals in this matter, the restraint on the vassal's alienation of his fief without his lord's consent being matched by the restraint on the lord's alienation of his rights without the vassal's consent (see *Consuetudines feudorum* bk. 2, 26, § *domino*; and bk. 2, 47). But Feudal Law does not run everywhere, and especially in France it is subordinated to Statute Law, according to what Douaren, on *Consuetudines feudorum*, ch. 1, n. 5, writes, following Molina. Accordingly, in such cases, where controversies arise outside the Empire between Kings and Princes, recourse must be had to the Law of Nations.
- 33 Now, I hold that the Law of Nations also disallows an alienation of rights over vassals without their consent and against their opposition; for the feudal contract binds the vassal not to give aid or render feudal service to any other than his lord, and this obligation can not be altered by the substitution of a new lord, especially as it may be to the vassal's interest to decline to recognize the substituted lord, either because this would render his future condition harder or because the rights of some prior fief granted by a third party who is an enemy to the substituted person, but not to the substituting person, prevent the transfer in question.
- 34 (8) And what about subjects: can they be transferred against their wishes, as a term in a peace? Although Nevizanus leans here also to a negative answer (cons. named, n. 107), yet the contrary opinion—and indeed without any reference to the terms of a peace—was held by Alexander Raudensis, *Cons. Pis.*, vol. 1, 4, n. 20, where he tells how the court gave the following judgment in the suit about Terracona (?): that the town, with all its rights, could be severed and alienated against the wishes of the population. That is the rule adopted in practice. Territorial lords who propose to alienate any part of their territory, together with the subject population or with their rights over that population, require no consent at all on the part of the latter. This is certainly so as regards the lower-class population who are more correctly spoken of as subjects; for the estates of a province are at times able to object to an alienation which is counter to agreement or privilege. And the argument just used by me in connection with the persons of vassals does not apply with equal force to a subject population, the

argument, namely, that it is to their interest not to have their condition made worse by reason of the quality of the new lord, seeing that these subjects (unless they be subject to proprietary rights, more like slaves, so that their consent does not enter into the question) can look after their own interests by a migration into some other locality more easily than vassals can. The last-named remain such wherever they find themselves, unless they propose to lose or abjure their fiefs; and they have not the same opportunity of selling their feudal property as subjects have with regard to their allodial lands.

(9) Next, From what time does a peace begin to bind? I refer to 36 what I have just said about truces, with this addition, however, that while a peace has the like *terminus a quo* as regards the commencement of the obligation, if nothing to the contrary has been definitely arranged, yet it can not, of course, have any *terminus ad quem*, the very essence of peace being that the abandonment of hostilities is perpetual.

What if the parties have, all the same, added a *terminus ad quem* to a 37 pacification? I reply that either the clause is ignored or else a truce, and not a peace, is set up, or at any rate not a simple peace, but one which includes some other business within its terms. In this number I should range the peace made in the fourteenth year of the preceding century between Louis XII of France and Henry VIII of England. Of this peace Guicciardini says (*History*, bk. 12), "At the beginning of August a peace was made between the two Kings, to last during their joint lives and one year thereafter. The terms included the retention of Tournai by the English." And soon afterwards the same writer adds that it was agreed, "that each was bound to aid the other's defense of his realm by sending ten thousand soldiers if the war was by land, and six thousand if it was by sea." Here we have a peace which includes an alliance also; and so the *terminus ad quem* must be taken to refer, not to the question of peace or of the simple cessation of hostilities, but to the alliance which was being created. And so the survivor of those Kings might not attack the kingdom of the other after his death, nor his successor in that kingdom, for any preexisting cause even after the *terminus* mentioned, especially since the possession of Tournai and the money which the French paid in order to obtain peace were not made over to the English in temporary, but in permanent, fashion.

And here the advice of Petrus de Ancharano is relevant (cons. 75, 38 beginning at *viso diligenter*, pr., and n. 5, at *etsi dicatur*); namely, that a clause which perpetuates the spirit of rancor (as it is called) should not be inserted in a peace, and is imperative, as being inconsistent with the nature of a peace. He is followed here by Moronus (*De treuga et pace*, qu. 187) and by Cardinal Tuschus (*Conclusiones practicæ*, vol. 6, 171, n. 21, letter P, where he quotes many others).

Seeing, then, that a peace is to be so interpreted as that this useful and necessary business shall endure and not fail, a clause naming a *terminus ad*

quem is either not to be allowed a place in a peace or else must be diverted so as to apply to the topic of an alliance or other subsidiary topic.

39 Let us, however, enquire a little more closely into this question of the interpretation of a peace. Here we meet, in the forefront, with the rule that a peace must be liberally interpreted, according to what Tuschus (*Conclusiones practicae*, vol. 6, 178, nn. 1, 4, onwards) writes, citing from Baldus, Signorolus, and others. Tuschus, however, goes on, as is his wont, to add certain limitations, so that uncertainty colors the whole of his assertion about the wide and favorable interpretation of a peace. Among other things, he refers to Baldus as authority for the doctrine that a peace and its articles are *stricti juris*, like a compromise, and therefore any omissions must be taken to be intentional. As an example he takes adherents or confederates, maintaining that if there be no mention of them in the peace, they can not be included within its security.

40 What then? A peace will of course have a wide interpretation in a case where words are used which are susceptible both of extensive and of restrictive interpretation. I agree in regard of the topic of public security, which in itself is favorable. But as regards subsidiary agreements in a peace—for example, whether a King or a Prince has conceded this or that thing to the other in return for a peace—in these respects the peace is *stricti juris*; and, as it possesses the character of a compromise, there is sufficient warrant for rejecting the claim of one who would base a larger claim on the instrument or document of peace than is expressly contained within it, for he has only himself to thank that his interests were not safeguarded by clearer words. In such a case as this, then, the peace will continue, and the claim of the party for more under the terms of the peace than is expressed in them will be treated as unjust.

41 My next question is, With whom does the right to interpret a peace rest? With those who made it. This is what the King of Sweden urged in our Reichstag a few years ago concerning the interpretation of the Instrument of Peace. A distinction must, however, be drawn here between a simple pacification which operates merely under the Law of Nations and a pacification which, at the same time, has the force of a law, as said above. In the former event (that is, if the peace is absolutely simple, or at any rate, if, in some of its provisions, it belongs to the mere Law of Nations) the interpretation of it rests with all the parties to it, subject, of course, to the rules of

42 equity. But in the latter event it is different; for the interpretation of matters which, by the treaty of peace, are left to the laws of a Republic or Empire, belongs to that Republic or Empire and not to the parties jointly. For example, there was a provision in the second peace between Rome and Carthage that the Carthaginians should live under their own laws; but this did not give the Romans any right to interpret the laws of the Carthaginians, and herefor there is the conclusive reason that every law of every State receives, by common right its interpretation and its limitation, and for good

cause its repeal, from the sovereign power of that State. When, then, outside 43 parties include items among the terms of a peace which are to obtain the force of Law within an Empire or Republic which is one of the parties, they are taken to have had in contemplation the common nature of Law, whereby it remains valid only so long as nothing inconsistent with it has been decreed, by way of interpretation, or restriction, or repeal, by the civil power of that Empire or Republic. Any claims in excess of this must rest on some special and express reservation.

Since, then, it appears from the foregoing that the interpretation of provisions other than those relating to public security must be strict, it follows that restoration to the former condition, in which the parties were before the war, is not taken as tacitly agreed on in a peace, but needs a special provision, as was inserted in the Germanic Peace named. 44

It follows further that, unless there has been a special agreement about the surrender of prisoners and deserters, one side is not taken to be bound to surrender them. The Romans more than once embodied this in an express agreement, as was seen in the pacifications with the Carthaginians and Philip and Antiochus. If, however, nothing had been arranged in the peace about 45 prisoners, then, despite the making of peace, they remained in their former condition of slavery. Tryphoninus (*Dig.* 49, 15, 12, pr.) gives a clear proof of this, writing, "During peace there may be postliminy for prisoners of war for whom no provision was made in the treaty of peace." Inasmuch as persons in this condition have postliminy during peace, and continue thereafter to be slaves, it follows that the making of peace did not free them from the condition of slavery.

But doubt may arise when the surrender of prisoners and deserters or of 46 the authors of the war has been expressly agreed on, it not being uncommon for a peace to contain a requirement to that effect. A question may then arise, Whether such an undertaking binds the promisor even if the persons in question, or some of them, are not within his control. A bitter dispute on this point arose between the Aetolian ambassadors and the Roman consul Acilius Glabrio, the latter requiring the surrender to him of the various authors of the revolt and, among others, King Amyntander, the surrender of whom was not within the power of the Aetolians (*Livy, History*, bk. 36).

It seems to me that a distinction should be drawn according as the sur- 47 render is introduced as an express condition of the peace, without which the other party would not have agreed to it, or merely takes its place as one of the provisions of the peace. In the former case I think that the peace which has been entered into does not operate, on the principle that the insertion of an impossible condition in a contract vitiates the transaction (*Inst.* 3, 19, 12; *Dig.* 44, 7, 31). There is here an absence of genuine consent, and this is the ground on which Mæcianus (*Dig.* 44, 7, 31) bases the rule; and I think it is consistent with the Law of Nations; for the rule whereby, in last wills, an impossible condition destroys itself but not the disposition, must be treated as merely Positive Law.

48 In the latter case the opposite holds, that is, the peace continues operative, it being possible to invoke a liberal principle of interpretation to the effect that the promisor must be taken, in case of doubt, to have bound himself to make the surrender in question only if the authors of the war, or the prisoners or deserters who were to be surrendered, were in his hands and power, so that he could surrender them. And therefore, on the admitted principle that in case of doubt a peace must receive such an interpretation as would keep it effective rather than undo it, the peace in question will continue in force even though no actual surrender be made.

49 As an instance of this, we have the peace between Antiochus and the Romans, one of the most prominent terms of which was an express demand by the Romans for the surrender of Hannibal and some others. The peace, however, held good despite the non-surrender of Hannibal, because, after the overthrow of Antiochus, he had betaken himself to Prusias, King of Bithynia, and was therefore not within the power of Antiochus. The situation was like that which occurred previously at the time of the second peace with Carthage, when Scipio's demand for Hannibal was met by the reply of the Carthaginians "that Hannibal was not in Africa." So Livy, following some other writers, tells us (*History*, bk. 30).

So much about peace, its efficient causes, objects, form and interpretation, and varying effects.

50 Let us now briefly consider the persons and office of mediators, it being rare that peace is accomplished without their aid. The part played in private affairs by an arbitrator, appointed by consent of all parties to arrange a friendly settlement of a dispute, is in public affairs played by a mediator. In his selection, attention must be paid to the two points of authority and justice. In the first place, then, no one can undertake that business of arranging peace between Kings and Princes who is not himself of a rank which entitles him to make war. And it is not to be wondered at, as this is a matter of public business, that there should be a requirement of public authority in the person of the mediator. Then, in the second place, justice is a requisite, it being particularly important that a mediator be not biased for or against either of the belligerents, but be a common friend, anxious for the restoration of public peace. No one, then, who has taken any part in the war can fitly fill the office of mediator. It was obviously for this reason that, in the recent war, the mediation of Sweden was rejected by the confederate powers.

51 There are two further requisites for a duly constituted mediation, the assent of the person who offers himself as mediator in any given case and the acceptance of his mediation by the disputants. Hence the question arises Whether there is any obligation to accept an offer of mediation. It would seem that there is such an obligation, because of the extreme inhumanity involved in a wanton rejection of the sacred proposal made by those who proffer themselves as mediators. So says Pufendorf (*De jure naturæ et gentium*, bk. 5, ch. 13, § 7), adding that their offer ought not to be rejected

on the mere pretext that there is some common interest between them and the other side; "for it is of course in my power," he says, "to decide how far I will accept their proposals."

I have no doubt, however, that the opposite opinion is easily defended, 52 namely, that a refusal of an offered mediation is allowed by the Law of Nations, in a case, that is, where there is ground for suspicion in the community of interest between the proposing mediator and the other side, for no one is bound to agree to a mediator whose person is suspect. And in the same way as, in private matters, judges or arbiters or arbitrators who are suspect may be rightly refused recognition, so also who will deny that in public matters, which are of so much greater moment, the same course is just?

Moreover, it is better to refuse a mediation at the outset than subsequently, and after expense has been incurred, to reject the proposals for a pacification favorable to the other side which the accepted mediator may have put forward. If this initial refusal is allowable, it is vain to speak of an obligation to accept a mediation which in all probability would be hopeless and futile. I go further, and say that, even where the person of the mediator is not clearly suspect, a party is free to refuse mediation according to times and circumstances. This is especially the case if the refusing party has a hope of speedy victory, and the other side counts on doing him a hurt by delaying or hindering his success in the war through the interposition of a mediation; so, also, if he does not deem it consistent with his dignity to submit to a decision of the proffering mediator.

There is in Livy (*History*, bk. 44) a notable instance of this, when the 54 mediation of the Rhodians between the Romans and King Perseus was rejected, or rather scorned. The Venetians put forth a different reason when they declined to accept Hercules, Duke of Ferrara, although his leanings were on their side; they would only have him as an arbiter of a compromise, and not as a mediator. They assigned expense as their reason, saying it would be wasted on a mediation. (See Guicciardini, *History*, bk. 4.)

I admit that sometimes parties have been compelled to agree, as happened to the Florentines in the already mentioned compromise arranged by Duke Hercules (Guicciardini, place named); or at any rate they have been made to stop fighting, as happened to Antiochus when at war with Ptolemy, and the Roman Senate interposed, as told in Livy (ch. 44). These, however, were instances of parties being compelled not by an obligation existing under the Law of Nations, but by fear of superior power and of some more serious evil to be incurred in case of disobedience.

What about the ministers of mediators, can they be rejected? I think 56 so, on just grounds of suspicion. King Louis XIV of France furnished an instance of this a little time ago; the Pope was about to undertake the part of mediator in the discussions about peace at Nimeguen, and the King through diplomatic channels objected to a man being sent to those discussions who was a creature of Cardinal Alferi and dependent on his nod, and required the

despatch of a prelate of higher rank. Here we have a great King protesting, not against the mediator himself, but against a minister of the mediator. This shows that an acceptance of a given mediator is not an acceptance of his ministers; and it is also clear that, when a person has been carefully chosen, it is meant that no deputy shall be put in his place or carry out the mediation. This is in accord with the opinion of the doctors on c. 43, at *is autem*, X. I, 29.

57 Now, this kind of business is ordinarily transacted by ministers; and, as a person is held to do himself what he does by another, a mediation can of course be carried out by ministers. Indeed, where a Republic is the mediator, this is almost necessary; otherwise the whole Senate or the whole people must come to the place of mediation. This doctrine must, however, be modified so as to provide for the appointment of ministers who are not suspect, and so that their functions be limited as a rule to discussion; but only those propositions are adopted as the propositions of the mediator himself which have issued from his authority and judgment. Hence, unless it be otherwise settled by consent of the parties and in the commission of the mediator, a legate who is about to assume the function of mediator on behalf of another is bound to a strict interpretation of his functions, and should not make any proposition on behalf of the mediator other than has been duly entrusted to him.

58 Let me add a few words about the office of mediator. It is a merely friendly office, and the award of a mediator has not the force of a judgment. Still, it is important to the parties not to be publicly spoken of as refusing to recognize the office of a good and reasonable man; and so, if they decide against the reception of the mediator's proposals, they should set out the reasons against the proposals which make their acceptance impossible for them. And what then? The mediator ought to strain every nerve to persuade and induce the parties on each side to accept a friendly arrangement. He will be the more likely to succeed if he has previously weighed the claims of each side and has indicated what the one side should concede to the other in fairness and equity or should waive through love of peace.

59 But what if, despite the best exertions of the mediator, one side or the other persists on declining peace, can he on that ground alone join his forces to the juster side against the recalcitrant party? The Romans did this more than once; and in the admonitory prohibition of war between Antiochus and Ptolemy they used the words, "if war was not avoided, then whoever was responsible therefor, they would not treat him as friend or ally." Not all their conduct, however, represents the Law of Nations; many things happened, by reason of their position, which, as I have already shown, raised other questions than those of the Law of Nations. A negative answer must, therefore, be given to our question, unless the mediator has a peculiar interest in the making of peace, such as would ground a just war against the recalcitrant party. If that condition be fulfilled, he may join forces with the juster side, not, however, because of the slight done to his mediatory proposals, but

accidentally, because of his concern in the threatened danger or loss. And I should give a different opinion, too, if there has been a special agreement on the point, as there was on the guarantee of the Peace of Osnabrück and Münster (see the Instrument of Peace, art. 17, § *veruntamen*).

What if the mediator moves too sluggishly, or deliberately leaves the 61 controversy in suspense? His mediation is then suspect on the ground either of bias in favor of one side or of his private interests. The Romans artfully employed this device in the controversy between Masinissa and the Carthaginians, when the ambassadors Publius Scipio Africanus, Caius Cornelius Cethagus, and Marcus Minutius Rufus abandoned the disputants to an unabated struggle, a measure which Livy thinks well-adapted to the circumstances (*History*, bk. 34, at end).

Lastly, I think that I must not omit to point out the resemblance between 62 “*treuga*” (barbarous word!) and a peace. There is a rubric of Papal Law on this subject in the Decretals of Gregory IX. “*Treuga*” is defined by a gloss on c. 1, X. 1, 34, “the security afforded to persons and things while war is still being waged and discord is not yet at an end.” Accordingly, Zoes (*Commentary* on the canon mentioned, n. 3) and Vallensis (nn. 1, 2) take “*treuga*” to be the same as “*inducia*,” or truce; but I should rather identify it with what we call safeguards, or safe-conducts, such as are given in war. The aforementioned description of “*treuga*” squares with these.

Let this be enough on this present topic.

CHAPTER XXI.

Of the Ratification, Execution, and Guarantee of a Peace.

SUMMARY.

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| 1-3. Whether, and why, a ratification of a peace is needed over and above the special commission of the ambassadors.
4, 5. A peace can be ratified either expressly or tacitly.
6. The marks of tacit approval of a peace.
7. Not proper to name the date up to which a peace is to last.
8, 9. From what circumstances an intention to name such a date is deducible.
10. What topics are included in the execution of a peace.
11. A commission to execute a peace must be restrictively interpreted.
12. The executor of a peace, appointed by agreement, may, if necessary, use force in the performance of his functions.
13, 14. Whether, and how far, the other side can execute a peace.
15, 16. The various objects of the execution of a peace.
17. Deserters not included in a peace apart from special agreement.
18. Whether, when peace is made, it is permissible to proceed against the discharged soldiery of the other side. | 19. Things ceded by the peace pass to the transferee in the same legal condition as they were in in the hands of the transferor.
20. The order in which the terms of a peace are to be executed.
21. The manner of executing the Germanic Peace of Osnabrück and Munster as regards things that were to be restored.
22, 23. The execution of a peace should be duly proceeded with in matters that are clear.
24. Whether that part of the execution of a peace which takes place too soon ought to be revoked.
25. Guarantee of, or security for the observance of, a peace is of two kinds.
26, 27. Whether, and to what extent, a third-party guarantor is bound to observe the peace.
28. What remedies a guarantor may employ to secure the observance of a peace.
29. A verbal guarantee of a peace.
30, 31. Whether a sworn peace is simple or guaranteed.
32-34. The clause <i>rato manente pacto</i> : what its operation is, in a peace. |
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I The first thing to be looked at here is the reason for requiring ratification of a treaty of peace; for, if it be true that a special mandate must be given when peace is made through ambassadors, as was held by Romanus (*cons. 115, n. 2*), followed by Cardinal Tuschus (*Conclusiones practice*, vol. 6, 171, n. 34), ratification would seem to be superfluous, owing to the force of the special mandate. All the same, even when a special mandate is employed in this business, it is clear that ratification must follow. This requirement was illustrated in the case of Scipio Africanus: he made peace with the Carthaginians at the bidding of the Roman people, but the details were left to his discretion; yet there was a subsequent special approval and confirmation of the peace by the Roman Senate. And the same thing was done by the parties to the peace-agreement of Osnabrück and Münster, as may be seen in the Instrument of Peace between the Empire and Sweden (art. 17, § *pacem*) and between the Empire and France (§ *eodem*), together

with the Imperial Abschied of the year 1654 (*§ Setzen demnach, ordnen, etc.*).

There is reason in the rule; for, although the ambassadors and plenipotentiaries of Kings and powers receive a special mandate to conclude a peace—such as Belisarius of old received from Justinian, who entrusted him with the peace-negotiations with the Gothic King Totila, and as Lanocius, Viceroy of Naples, received from the Emperor Charles V for the settlement of terms of peace with Pope Clement VII—yet there may be various articles in the peace that are not within the special mandate. For instance, Charles V refused to ratify several articles of the peace just mentioned, which his ambassador had concluded; and he was within his right in so doing, for a special mandate to make a peace does not imply that each and all of the articles of the peace are covered by the special mandate. Moreover, it is so vitally important to the parties that everything done should be in exact accordance with the instructions given, that it is quite right to require a special ratification—even in private matters a mandate given with free powers of administration does not absolutely carry the authority to make a gift (*Dig. 39, 5, 7*).

How is ratification given? There is no doubt respecting a verbal ratification or about a ratification by formal exchange of instruments. The latter was the mode employed a few years ago in the Germanic Peace (see § *pacem*, aforenamed). But it is a further question Whether and how far ratification can take place by conduct. The Samnite General, Caius Pontius, thought that the Caudine Peace, although concluded without the consent of the Roman people, nevertheless bound them by the force of a tacit ratification; and he strove to make good his case by reference to their conduct, saying, “It is unjust that you should obtain safety for such a number of your citizens and that I should not have the peace which I have made,” which was as much as to say that the Romans had approved the peace by not restoring, and by refusing to restore, the legions whom the Samnites had trapped in the pass.

Now, as there is no doubt about the rule that a peace can be tacitly ratified by conduct as well as expressly by words—there being, as Julian says (*Dig. 1, 3, 32*), no difference as regards obligatory force whether a people declares its intent by a vote or by conduct—so, also, it is not every kind of conduct that has this effect, but only such as contains within it a tacit consent. This is a matter to be carefully scrutinized, seeing that the virtue of a tacit ratification depends on it.

Accordingly, if, after the conclusion of a peace, a King or people, being in full possession of the facts, carries out and performs the articles on its side, it may be deemed to have tacitly ratified the peace; but this does not follow where a party derives some advantage from the peace more through the blunder of the enemy than through its own conduct. That is why it was absurd to require the Romans to send their legions back into the pass if they would not observe the peace, seeing that the Roman people had not procured the release of their legions from the defiles of Caudium by any act approving

the peace, but had got them back, as Postumius asserted in the Roman Senate, through the interposition of fate, owing to the enemy having let them go in ignorance of the empty character of the peace.

7 As regards the period during which a treaty binds, the same rules apply as I laid down above about truces; that is, where the question is about fixing a date up to which the treaty is to bind. A date of this kind can not be assigned in a treaty of peace, because every peace is in its nature perpetual; and this rule goes so far that, even when such a date is expressly inserted in the treaty, it is taken as not written. And no wonder; for, a subsidiary agreement inconsistent with the substance of a transaction is itself void, and does not render the transaction void (*Dig.* 43, 26, 12, and glossators thereon). As long, then, as there is no doubt about the true intent of the parties to conclude a peace, even though they name a date up to which the peace is to endure, it endures after that date just as if no date had been assigned.

8 But you ask how we can infer this true intent if the parties have expressly assigned such a date. My answer is that, in the first place, it can be deduced from the language of the contracting parties, whenever they say in the articles of agreement that they are making a peace up to such and such a time. For this business is favorable to such a degree that it must be construed rather as peace than as a truce, and that no effect is allowed to the addition of a time-clause rather than that it should derogate from the peace by a conversion of its perpetual character into the temporary character of a truce. Further, there are other circumstances which may also show the same thing—for instance, the great length of the time named, as in the peace made by our Emperor with the Sultan of Turkey; and this is especially so where it is provided that the peace is to endure for the life of the contracting parties or one of them, as in the pacification between King Henry VIII of England and King Louis XII of France.

9 The same presumption in favor of the peace may be drawn from other business being connected with it which is not found in connection with mere truces, such as an alliance, as I showed at length in the preceding chapter by reference to the Franco-English Peace; so, although the inclusion of a time-clause has no direct effect upon the peace, it is not similarly void of effect as regards businesses connected therewith.

So much on our first topic.

10 Our next topic relates to the execution of the peace. Unless this duly follows, the agreement for a peace will be nugatory. Here there are three things to be considered: the persons entrusted with the execution, the things or acts to be executed, and the mode of executing them. As regards the persons, they are either named or not, in the articles of peace or other special agreements. In the former case the execution of the peace is the duty of conventional executors thereof; in the latter case it is the duty of the parties who, under the articles of peace, have to perform or restore or do something. If the conventional executors are dilatory or backward, the parties must take

charge of their own interests in accordance with the terms of the commission of execution contained in the articles of peace, because, unless otherwise provided, the duty of executing the peace is not entrusted to any third person.

Sometimes, however, it is not the execution of the whole peace, but only ¹¹ of certain articles thereof, that is entrusted to executors. This was the case with the recent Germanic Peace, the execution of which was entrusted to the ruling Princes of the Circles only with regard to the payment of the pecuniary award to Sweden (*Abschied* relating to the execution of the Peace, § *in massen*, 37). In this case the executor had no powers outside the single matter entrusted to him. When the execution of a peace is taken in hand by the parties themselves, it makes no difference whether they carry it through in person or by their agents, as where they deliver up fortresses and cities or provinces, in fulfilment of their promises in the peace, through the medium of prefects or governors.

Further, I doubt not that a conventional executor can carry out the duty ¹² trusted to him by the consent of the parties even though one side or the other is unwilling; nay, that if needs be, he may use force to compel a recalcitrant party to observe the terms of the peace. For there is a great difference here between public business such as this and private causes. In the latter the aid of a judge may be prayed; moreover, in them the right to distrain on goods does not apply to a case of resistance by force, as the doctors note on *Cod. 8, 13, 3*, because the aggrieved party may then have recourse to the civil authorities, and they will restrain the improper use of force (*Dig. 4, 2, 23, pr.*). But in these public affairs there is no similar superior authority; and so, to prevent the parties from resorting to armed strife, it is only proper to assume that a power to execute the treaty, even despite the forcible resistance of one party, is within the commission. And an agreement to this effect is not hard to find in the aforementioned public agreement (*Abschied* concerning the execution of the Peace, § *damit aber dass übrige* and § *in massen*).

Then the question arises Whether, in default of executors, the other side ¹³ may proceed to execute the peace. I think not, unless it is otherwise agreed; for the war is more likely to blaze out again when the execution of the peace is conducted by the enemy than when it is in the hands of a third party. Moreover, the first step in the exaction of a public debt ought not, as a rule, to be execution, that being proper only when embassages have been sent in vain to demand satisfaction and war has been duly declared; and there is no reason for departing from the rule when the debt in question has arisen by one party binding himself to the other in articles of peace. If, then, there be no executor, it is the duty of the party to execute the peace, meaning the party who is the debtor under the pacification, and not the party who is the creditor. And in an ordinary case of delay there are remedies available—embassies, mediation, and in the last resort a fresh war; but before the parties resort to this again, they ought to try all other measures.

14 What was in my mind when I said above that it would be different if it was otherwise agreed is, that if, under a clause in the articles of peace, a right of possession or of taking possession in the future on his own authority is expressly conferred on one party—such as was conferred on the Most Serene Elector of Brandenburg in respect of the Archbishopric of Magdeburg (Germanic Peace of Osnabrück, art. 11, § 6)—then no embassage will be necessary, but the party beneficially invested, by virtue of the peace, with possession has powers of direct execution in some way or other.

So much about the persons charged with the execution of a treaty.

15 The objects upon which a treaty is to be executed are either things or acts. Different kinds of things may be distinguished here: for rights over kingdoms or provinces may be surrendered or transferred; or, again, the fortresses, cities, fortified towns, provinces, or kingdoms which are in any one's possession, or money or foodstuffs, etc., may be made over and delivered in return for peace, as may be seen in the old formulas of peace between the Romans and the Carthaginians and others.

16 By the word "acts" I refer to the extradition of prisoners and deserters and to the restoration of archives and other literary documents which usually accompanies the restoration of a place. And here also belong the disbandment of troops and the withdrawal of garrisons and such like. These, however, are part of the execution of a peace only if there has been an agreement about them. The rule with regard to deserters, indeed, is that they are not included within the general amnesty of a peace, their kind being odious; and the contracting parties are not held to have contemplated them unless they be expressly included. So we retake a deserter by right of war, as Celsus says (*Dig.* 41, 1, 57); and a discharged soldier is also treated as an enemy, according to Tarruntenus Paternus on *Dig.* 49, 16.

17 The question of deserters may be looked at from two points of view, that of the King or people to whom, and from whom, they have deserted; and, just as the former is not bound to give them up without a special agreement, so the latter is not bound in virtue of any general amnesty to give them any immunity. Accordingly, when towns are surrendered, we see that any persons who have been great defaulters or who have deserted are claimed by the victors for punishment, or are exempted from the rest of the inhabitants, despite any agreement about immunities.

18 Then there is a question Whether, after the peace, measures may be taken against soldiers who have been discharged by the other side. I think not; for such soldiers ought to enjoy the benefit of peace and security provided by the general amnesty, unless they had been discharged before the pacification, in which case they do not seem to be included therein without express mention. All the same, it would be more generous to show them some consideration, and not to impute it to them as a fault that they ceased injurious hostilities somewhat too soon.

Further, there is no doubt that cities, provinces and kingdoms which are 19 ceded by the articles of peace—provided, that is, that these definitely arrange for such cession—pass to the transferee in the same legal condition as they were formerly in in the hands of the transferor. Therefore, the whole cession is subject to the rights of any third party, even though this matter is not mentioned by the parties. Still, if the third party takes no steps, I should think that, at the least, the transfer amounts to such a lawful title as will, in course of time, support a prescriptive claim; this doctrine applies by the law of war, quite apart from a peace, as is shown by the case of the Children of Israel against the Ammonites, mentioned above. And of course that is also the end and aim of the provision in the Instrument of Germanic Peace directing the restitution of large numbers of estates and provinces, with, however, a clause saving the rights of third parties (*salvo jure tertii*); and any such third party could of course prejudice himself by silence extending over a considerable time.

Our next topic relates to the order in which the terms of a treaty are to 20 be executed. If any provision has been made on this matter, it must be followed; if none has been made, equity requires either that the execution proceeds at an equal rate on both sides or, if such simultaneous progression is impossible, that any matter which, in its nature, comes first, should be first executed, or else that which is of most importance to the peace. For the parties probably intended, in the treaty of peace, that the execution thereof should begin with that matter the delay or neglect of which would be most likely to supply an occasion for fresh disturbances.

In the Germanic Pacification of Osnabrück and Münster careful heed 21 was paid to this whole matter as regards restorations. For very various conditions prevailed among those whose possessions were to be restored to them, according to the state of things which existed before the war; and so it was provided that the restoration of some was to take place simultaneously and inseparably, and of others only after an interval, when the claimants had proved that their possession was in existence before the war. Accordingly, both general rules were laid down for the purposes of this distinction and also, specially, the Princes and Estates of the Empire who were to be unconditionally restored were enumerated in a long list, while, as regards others, the execution of the peace in this particular was unavoidably subjected to delay.

And what if, in a case where no order in which the terms of a peace are 22 to be executed has been prescribed, the parties disagree and one of them is dilatory even in the execution of indisputably clear provisions? I do not think that a dilatory plea can be justly based on this doubt about order; for just as, in private matters, the execution of the clear items of an agreement neither ought to nor can be suspended on the plea that some of the items are not clear, so delay in these public matters is the less supportable in proportion to the seriousness of the injury which it can cause in matters of very great moment. Accordingly, the execution of a peace, so far as its articles are clear, 23

may not be deferred on any plausible ground or pretext of taking security; for he who has bound himself by clear articles absolutely and without any mention of security, has only himself to thank; though it would be different if some very weighty and just cause supervened which was unknown at the time of concluding the peace, in respect of which equity would suggest a certain suspension of the performance of the clear provisions until security had been taken with regard to the dubious provisions; this course, however, must be sparingly indulged in, in the interests of peace, and it need only be acquiesced in on proof that a cause of this kind has supervened.

24 And, suppose that execution of some of the terms of the peace has taken place without paying regard to the prescribed order, ought it to be revoked? Only where it has taken place against the will and protest of the other side; for if the other side tacitly or expressly consents to such execution in a wrong order, the execution will undoubtedly hold good and can not be revoked.

25 There now remains our third main topic, the security or guarantee for the observance of the peace. This may be of two kinds, verbal or real: verbal, when it is effected by a verbal or written promise; real, when peace is secured by giving hostages or by the impigneration of things, especially fortresses and fortified cities, and the like. Again, a peace may be secured either by the parties themselves or by a third party guarantor, as happened a few years ago in the peace between the King of France and the Elector of Brandenburg, when the King of Sweden undertook to guarantee the peace.

26 Now, the question arises here, (1) with regard to the guarantee of the third party, Whether and to what extent he is bound to compel recalcitrant parties to observe the peace. This point was disputed in connection with that same Swedish guarantee of the Franco-Brandenburgic Peace, the Swedes holding that, by virtue of the guarantee, they were right in calling on the Elector of Brandenburg to abstain from assisting the Empire against France, while the Elector of Brandenburg and his allies maintained the contrary.

27 I do not now propose to go into this question in detail; but I think that, in accordance with the principles of the Law of Nations, a mere withdrawal from a peace or renewal of the war does not furnish just cause for the exercise of the guarantee, but only such a renewal as is conjoined with injustice. For he who is justified in non-observance of the peace, (say) for relevant and especially for fresh cause, is within his right and consequently can not justly be compelled to observe the peace; and it is not likely that the contracting parties intended the guarantee to avail and operate in a case where resort to arms despite the peace is permitted by the Law of Nations.

28 (2) Another question is about the remedies to which a guarantor may resort in order to secure the observance of the peace intact. To begin with, he should use persuasive methods; and if his best endeavors of this kind fail, then, and then only, he should use forcible methods. And when such measures are justified, there is no need of a special declaration of war, since a guarantor of a peace is entitled by reason of the consent of the parties to do

what his office requires. Yet it would be more just, I am inclined to think, for him to announce to the peace-breakers that he is about to employ the last resource which is open to a guarantor of the peace in order to establish the same. And in the employment of these measures he must not go beyond restraining the contravening party from unjust violations of the peace, and compelling him to redress any injury that he has done by such violation, and to observe the peace in future, and to give proper security therefor.

(3) You may ask how a verbal guarantee of the peace can be given by 29 the parties themselves; for, as it is they only who answer for the observance of the peace, no additional security arises other than comes from the nature of the peace, whereas a guarantee proper is an agreement accessory to the peace. My answer is, that a number of allies may join in a verbal guarantee, all of whom bind themselves, some on one side and some on the other, to uphold the observance of the peace against transgressors. This undoubtedly gives an accession of strength to the peace. We have a notable instance of it in the Instrument of Germanic Peace (art. 17, § *pax vero*, etc.).

(4) When a peace has been affirmed by an oath, are we to say that it is 30 a simple peace or a guaranteed one, in the proper sense of the word? I think that, as regards the obligation on the conscience, seeing that there is nothing more sacred than an oath, a peace so concluded may well be said to repose on the most stringent of guarantees. But as regards external acts, and especially in view of human perfidy and the frequency of perjury, I think it is more consistent to hold a peace of this kind to be merely verbal, inasmuch as the party to whom the oath is given obtains no further security therefrom than he does if the swearer abides by the undertaking to which he has sworn.

And so when a certain Roman Senator asked the Carthaginian envoys 31 who were seeking peace, by what gods (speaking as a pagan) they would strike the treaty, seeing that they had broken faith with those by whom they had sworn the previous treaty, Hasdrubal, the chief of the legation, made the excellent reply, "By those same who have shown such bitter hostility to the violators of treaties." The Senator meant to denounce their lax observance of their oaths; Hasdrubal, on the other hand, found in the punishment which had followed on perfidy an assurance of the obligation to perform what was sworn. (See Livy, *History*, bk. 30.)

Lastly, we may ask what is the effect of the clause *rato manente pacto* 32 ("as long as this agreement is observed") in a treaty of peace. It was added, as we see, to the Instrument of Germanic Peace, § *pax vero*, where it is agreed that, despite any contravention, the peace must nevertheless remain in full force; so that clause mainly secures the continuance of the peace where there has been a breach of it. And in private transactions also, this was the practice under the Roman Law, with the result that these transactions remained valid and effective by virtue of this clause although there had been a breach (*Dig.* 2, 15, 16; and *Cod.* 2, 4, 17).

- 33 But is this to be taken to apply to the party contravening only, or also to the aggrieved party? It must surely be left to the discretion of the aggrieved party whether he will abide by the agreement, be it public or private. That certainly is what is laid down in *Cod. 2, 4, 17* with regard to a private agreement, even where the aggrieved party had already carried out his part of the compromise, so that he would have the option of reclaiming what he had already transferred. Similarly also, in the Instrument of Peace (*§ pax vero*) it seems to be provided that a breach of that peace committed by one party is not to dissolve the peace as regards the other parties, if they elect to abide by it. This clause, then, is clearly added in different transactions not in favor of those who break, but of those who keep, their agreements. It certainly ought not to prejudice the latter, who, apart from any such clause, have a right of withdrawal in accordance with the rule, "Faith may be broken with him who breaks faith."
- 34 This is so unless it is apparent that the parties intended this clause to apply also to the aggrieved party, depriving him of any right of withdrawal from his agreement on the ground of breach on the other side. And I see no objection to this being also agreed on in the public interest. Anyhow, it must be noted with regard to the effect of this clause that, if a penalty be provided for a breach, the party who observes the agreement may at the same time claim the penalty and abide by the agreement. (See Wissenbach, on *Pandects*, part 1, dist. 10, th. ?.)

So much for the present chapter.

CHAPTER XXII.

Of Rupture of the Peace, and Supervening Cause therefor.

SUMMARY.

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| 1. Meaning of a rupture of the peace.
2, 3. Whether every one is rightly said to break a peace, who takes offensive measures against or attacks an enemy.
4, 5. Whether offensive measures are imputed to a new or to the old cause.
6. The clause "so long as this agreement continues to be observed" has no operation in favor of the peace-breaker.
7, 8. A promise not to contravene the peace does not bind as regards future causes; not even if there be an express agreement added to that effect.
9, 10. An exception to this.
11, 29. Consequences of a breach of the peace not to be extended to allies.
12, 13. The protection of the peace does not include those who were put under ban after the peace.
14. For acts to amount to a rupture of a peace, they must infringe express provisions in the agreement. | 15, 16. Whether adultery with the wife of the other party amounts to a rupture of the peace.
17-19. Difference between breaking a peace and furnishing a new cause of war.
20, 21. The requisites of a conventional penalty for rupture of the peace.
22-25. The aggrieved party can not claim the conventional penalty of breach if he, in his turn, resorts to offensive measures.
26. Whether peace continues when the aggrieved party resorts to offensive measures again and again.
27. Whether the peace-breaker can avoid a new war by offer of amends.
28. Whether the penalty of rupture of the peace is incurred on each repeated contravention.
30, 31. Whether the guarantors and successors of the peace-breaker are liable for the penalty of the rupture.
32-34. Whether it is permissible to break the peace for an old reason. |
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The word "rupture," in connection with a peace, is generally understood by writers in a bad sense; for it means an unlawful contravention whereby the peace is broken by one of the parties. That seems to be the sense in which it is taken by Grotius, *De jure belli ac pacis*, bk. 3, ch. 20, § 27, where he points out that to give new cause for war and to break the peace are different things. But in ordinary parlance there is said to be a rupture of the peace when we believe that one of the parties breaks it for just cause. As, then, according to what has been said above, a war is labeled just or unjust by reference to its cause, so also the justice or injustice of a rupture of the peace springs from the same fount.

Let us accordingly begin by considering the causes for which a rupture of—or, if you dislike the word, a withdrawal from—the peace may be held just and lawful. And in the forefront the rule must be noted that he is not said to break a peace (unlawfully, of course) who takes the offensive against, or attacks, an adversary for a fresh supervening cause. This was the doctrine of Bartolus on *Dig.* 48, 19, 16, 2, which is adopted by the doctors generally, as cited in full by Mascardi (*Conclusiones omnium probationum*,

1157, n. 6), Julius Clarus (qu. 47, last §, n. 9), Cardinal Tuschus (vol. 6, conclus. 183, the whole). I am aware that these doctors and those quoted by them are mainly speaking of a private attack in breach of an agreement; but the same principle applies in the violation of a public agreement, on which see Gail, *De pace publica*, bk. 1, ch. 4, n. 45, where he gives as his reason (and it is that of Mascardi also, place named, n. 7), that the clause "things remaining in their present condition" (*rebus ita stantibus*) is read into all agreements (*Dig.* 2, 15, 16; *Cod.* 2, 4, 17; *Dig.* 46, 3, 38, pr.). Therefore it will be quite right not to keep peace with one who offends afresh, and so breaks the good-faith of the peace. And the principle applies equally to a public peace and to a private agreement not to attack, or to remit the penalties of wrong-doing; and so the same remarks apply to both cases.

4 Of course, that doctrine of the doctors that offensive measures are presumed to be taken on new ground (see, among others, Gail, place named) must be construed in a reasonable sense; for, if it were allowable without qualification to say of one who assumes the offensive after making peace, that there is a presumption in his favor that this is for a new cause and therefore is lawful, this would often seriously prejudice the aggrieved party by throwing on him the burden of proving the nature of the old cause. But what was in the mind and opinion of the doctors in this matter is really this, that when there is a clear case of offensive action after the making of peace but there are two causes to which it may be attributed, one the old cause and the other a fresh one, then, for the better avoidance of fraud and wrong-doing, the offensive act must be attributed to the fresh cause rather than to the old one, with the result (if it were attributed to the latter) of increasing or bringing into operation the penalty for breach of the peace (*Dig.* 17, 2, 51, and doctors thereon; and *Dig.* 48, 19, 42). Accordingly, a new cause is not presumed, in and by itself, whenever there is an offensive act after the making of peace; but, if the new cause be actually present, the act is imputed to it rather than to the old cause.

5 Hence, Cephalus (bk. 1, cons. 35, n. 6) well says that we must first be duly certified about the new cause before proceeding to enquire into the cause on which the offensive act was done. Into this statement Julius Clarus (place named) reads the aforementioned rule, rightly adding, moreover, this limitation, that the peace is not considered broken when he who adopts the offensive measures has really given no cause or occasion for a second quarrel, and has in no way procured or led up to it. This is how the rule is settled in private disputes, and therefore, by parity of reasoning, also in the public wars of Kings and peoples.

6 And it is immaterial that the parties have inserted in the instrument of peace a clause "as long as the agreement continues to be observed" (*ratio manente pacto*), because this clause, as said in the foregoing chapter, does not operate at all in favor of the peace-breaker (according to Baldus and Paolo di Castro, on *Dig.* 2, 15, 16; and 45, 1, 96; and, in our own phraseology, Alex-

ander, of Imola, bk. 4, cons. 115, nn. 7, 8, and Rovescula, on the same text, notes, letter G, where he quotes many others).

Nor is the position altered by a promise of the parties, whether accompanied by an oath or not, not to contravene the peace, because it must be limited to past causes, and not to future or supervening causes; this was the opinion of Signorolus (cons. 5, onwards from *cum inter Gabrielem*, nn. 7, 8), and Mascardi follows him (*Conclusiones omnium probationum* 1157, nn. 8, 30).

What, however, if the parties have expressly agreed not to withdraw 8 from the peace even on fresh ground of offense? Such an agreement could hardly be absolutely binding: it smacks of fraud and invites wrong-doing; for the way would be opened for injuring the other party, he being all the time unable to assert his rights lawfully. Clauses of that kind are reckoned unlawful even in private agreements (*Dig.* 2, 14, 27 (3 and 4)). Do you see any reason why it should not be the same in public agreements?

Still, this is not necessarily the effect to be attributed to the clause, if 9 the parties have provided in the agreement other remedies for redress of future wrongs—for instance, a reference to arbitration, such as was agreed on in the Pacification of Osnabrück (§ *pax vero*, and § *et nulli*). In such a case a rupture of the peace would, I think, not be permissible even for subsequent matter of offense, so long as there is room for a judicial enquiry. This was 10 what Archidamus, King of Sparta, thought proper in the deliberations about war against the Athenians; he said that it was wrong to attack those who were ready to submit to a judicial investigation. And this is especially applicable to the cases where, by common consent, a tribunal has been created for the general decision of these weighty controversies, like the assembly of the Amphictyons among the Greeks.

It is, I think, clear that the right of retorsion which a rupture of the 11 peace gives to the aggrieved party ought to be restrictively construed, as being odious; and so it ought not to be asserted against the allies of the peace-breaker, for another's wrong-doing ought not to prejudice any one or take from him the rights obtained under the pacification.

Again, sometimes, after the making of a peace, we are justified in attacking 12 a party by whom we have not been injured, as in the case of those put under a ban after the peace (Bero, vol. 3, cons. 196, n. 11; Cardinal Tuschus, vol. 6, concl. 182, n. 1, onwards), provided the ban be justly imposed and for causes not touching the peace. As an example of this, we have the case of Henry the Lion. Different Princes of the Empire had previously made peace with him; yet they were enabled to attack him with impunity subsequently, when he was proscribed by the Emperor Frederick Barbarossa.

But as to what Bero (place named) writes about the possibility of 13 killing a banned person with impunity and without rupture of the peace, even though he has been expressly included in the peace—and this whether the ban was pronounced before or after the truce—I think that this is sound with

regard to a private truce, but not with regard to a public peace (so also says Bartolus, on *Cod.* 3, 27, 2); for a private pacification takes away the right of private redress, but not of public redress. But a public pacification must not be wantonly thrown to the winds; and a person who is expressly included therein is in due enjoyment of public security, even though he had previously been banned; otherwise, he would be deceived by this breach of faith.

14 Further, an offensive act does not, merely as such, amount to a rupture of the peace; but it must be something contrary to the articles of the peace. In this connection we have Grotius' distinction, already referred to by me, between a rupture of the peace and giving a new cause of war; and writers illustrate this by the case where one of the contracting parties commits adultery with the wife of the other, or does him some other wrong of that kind: the peace is not deemed to be broken thereby (Mascardi, concl. 1157, n. 84, and Cardinal Tuschus, concl. 182, n. 34, out of many others quoted) unless the act in question was done with deliberate intent of affront (Tuschus, same place, n. 38; Julius Clarus, place named, 47, at end), these writers putting the case where the woman was old or ugly so that lust was not the motive.

15 However that may be, even where the adultery is with a beautiful woman a presumption of affront is tenable, and the adulterer's lust can not discharge him from liability for affront and the deliberate intent to commit it. So not Menelaus alone, but all the chieftains of Greece, deemed themselves affronted by the rape of the lovely Helen. For when a man acts from lust knowing that his act can not but be an indignity to the other party, how can he not have the intent both to gratify his lust and to offer the indignity at the same time?

16 I think, then, that the answer to our question whether this amounts to a rupture of the peace, depends on the way in which the articles of peace are framed. If the contracting parties have mutually undertaken in general terms not to injure each other either directly or indirectly, adultery with the wife of one of them will certainly break the peace, whether she be fair and young or ugly and old; and if, in the agreement, the parties wiped out the wrongs of the past only, and either made no mention of future wrongs or no mention in a general form, or the equivalent, I think that such adultery gives a just cause of war, but that the peace itself is in strictness not broken: and the same ruling holds, subject to the same distinction, of other causes or wrongs, such as theft, homicide, and the like.

17 You will ask, What is the difference between the two as regards effects? I think it is mainly in two respects. (1) In a breach of the peace the aggrieved party can take hostile measures against the peace-breaker without a fresh declaration of war (though it would be better to make a fresh declaration). This is not so, however, where there is no breach of the peace, but some supervening act gives a just cause of war. And this war would be justifiable;

for he who unlawfully breaks a peace puts himself, by his conduct, in the position in which he was just before the peace or in the time of war, since he can not any longer base any legal claim on the peace which he has himself violated. Now, in that former position he could undoubtedly have been attacked with armed force, and so therefore in this later position.

That other considerations obtain in the alternative case can, however, 18 be easily shown, seeing that peace remains in full operation until ended by a new war; and for a new war the justice of the cause is not enough, but meet redress must be sought by an embassage or otherwise; and if it be not then obtained, war must be preceded by a due declaration, in accordance with what I said above on this topic, in the proper place.

(2) There is, further, a marked distinction between the two with regard 19 to the conventional penalty, if any such is provided in the agreement, for an infringement of it. They who thereafter break the peace incur this penalty, but not they who merely furnish a new cause of war. The afore-cited doctors have dwelt much upon this difference of effect. Now, I take it that this holds whether the peace be broken by commission or by omission, as by non-performance of promises of money or troops. It was on this score that the Venetians, some time ago, instructed their legate, Peter Pisaurus, to offer, in the name of the Republic, the sum of eight hundred pounds of gold in connection with the breach of the treaty made with the Emperor Charles V (the Venetians had not sent him the help promised in the treaty).

This shows that there are two requisites to the exaction of a conven- 20 tional penalty for breach of a peace: namely, an agreement, and a wrongful intent of contravention. For, as said above with regard to the interpretation of such an agreement, we must not adopt the construction that the penalty is incurred through anything accidental. Further, in that contravention there 21 are also two points to consider: the act which is a breach of the peace, and the rightfulness of that act. If, then, what is done, though in breach of the peace, is not wrongly done—as where the doer was already aggrieved by a breach—or, though wrongly done, is not in breach of the peace, there can be no room for the conventional penalty, which comes within the bargain only when one of the contracting parties actually withdraws from the peace with unlawful intent to abjure it. (Baldus, vol. 2, cons. 196, n. 8, at *quis ergo*; Romanus, cons. 258, at *in casu*, n. 5, onwards to end.)

This applies especially in the case where the contravener puts forth a 22 claim that the penalty ought not to be exacted, as distinguished from the case where he himself claims the advantage of the penalty by reason of a prior contravention on the other side; for in the latter case there is a different principle of interpretation, in that it is the aggrieved party who now assumes the offensive, and therefore lawfully. All the same, he can not claim the penalty, as Decio (cons. 380, n. 4) expressly ruled. And so the peace-breaker becomes thereby a kind of debtor of an alternative; so that an innocent party can either, in his turn, assume offensive operations against him or claim the

conventional penalty; but he can not do both at the same time, that is, assume the offensive and claim the penalty, unless this has been expressly agreed on.

23 I should give the same ruling even if the peace contained the aforementioned clause "*rato manente pacto*"; because, although, in accordance with what has been said, the first party to be aggrieved does not break the peace by taking the offensive in his turn (Alex. Imola, cons. 115, n. 9, at *nec iis obstat*; Cardinal Tuschus, conclus. 82, n. 50), yet the same does not apply to the effect of a penal clause, so as that the first to offend incurs the penalty and must pay the aggrieved party even though he in his turn offends. It is easier for us to remit the penalty in the case of the second offender, who follows the example of the first, than to allow him, who has committed the same offense, to claim it. The aforementioned clause ought not to produce both effects at the same time, namely, the punishment of an offense which is committed in retorsion, and the exaction of a penalty from the offender.

24 But you will say, in that way the offender and the offended are treated equally, and the clause "*rato manente pacto*" is deprived of all force, seeing that, apart from it, offense by way of retorsion would be permissible. My answer, speaking absolutely, is a denial of the consequence. For it is no longer open to the first offender to treat the peace as still in continuance or not, at his pleasure; but it is otherwise with the first party to be aggrieved, because, if he subsequently adopts active measures of offense by way of retorsion, he has only himself to thank.

25 The force and effect of this clause, then, relate to the observance of the peace, and not to the extension of the conventional penalty. And it shows us plainly enough that, after the first offensive act of retorsion, the aggrieved party can still hold to the observance of the main articles of the peace and yet, at the same time, claim the penalty for contravention. For our contention that, as regards the exaction of a penalty, he is out of court by reason of his counter-offense and his (so to say) punishment of the offender, relates to an odious provision, and not to the favorable provision about the preservation of the peace, from the advantages of which his offense ought not to debar him.

26 Various questions can still be put on this topic. (1) Whether an aggrieved person is allowed to retort offensively on every occasion of offense. I think this is permitted when the war has broken out again, but not so long as the peace subsists. For who will deny that his second offense reduces affairs to a state of war, even when the peace contains the clause "*rato manente pacto*"? Seeing that the aggrieved party takes active steps a second time against the offender, he unmistakably declares his intention of reviving the war because of the breach of the peace; nay, the same might be said of the first act of retorsion.

27 (2) Can the peace-breaker avoid a new war by the offer of suitable amends? The answer is the same as I gave concerning an offer of redress made when the war is in progress, and concerning security against future injury, a rupture of a peace and a declaration of war being each like the other in this respect.

(3) Does a peace-breaker incur the penalty for breach for each separate 28 contravention, or only once? Since, in penal matters, we ought to lean to the milder opinion (*Dig.* 48, 19, 42), it seems that he is liable only once, unless the contrary is expressly provided in the treaty by a clause that "the amount of the penalty shall be due for each separate contravention," or unless the circumstances of the repetition of the breach be such as to justify the contrary. What, for instance, if the penalty be small and the contraventions very serious? or what if the penalty has been paid and a fresh contravention follows hard on the payment? In these and like circumstances the justest construction would be in favor of a repeated penalty.

(4) Does a rupture involve the allies of the peace-breaker also, so that 29 they may lawfully be attacked and injured? Yes, if they are allies for the purpose of the act of breach or of fresh war; no, if this is outside the alliance. In the former case, what the Corinthians said in opposition to the Corcyraeans in the Athenian Senate holds good, "if you join your forces with theirs, you too must be crushed, as well as they." But in the latter case the rupture, being odious, ought not to be extended to non-participants.

(5) Are the successors and guarantors of the peace-breaker also liable 30 to the penalty of the breach of the peace? I do not doubt that, according to the Law of Nations, this is so if no further steps have been taken and war has not been actually renewed, this matter having, as it were, the effect of the commencement of a suit (*litis contestatio*) as regards transmission of liability to successors. No objection can be taken to this on the ground that penal actions are not transmissible to heirs, because that rule does not hold of the public businesses of Kings and peoples, being merely Positive Law and based on principles inapplicable here. Further, the right of a surety to require the 31 creditor to have recourse to the debtor first (*beneficium ordinis*) ought not to operate in favor of the guarantor of a public peace, for the same reason of diversity of principles. And the same also holds, I think, about the right of one surety to claim division of the liability among all the co-sureties (*beneficium divisionis*), so that each guarantor of a peace is liable for what he has individually promised to submit to as the penalty of a breach.

Lastly, is it permissible to withdraw from a peace and make war again 32 for an old but entirely relevant reason? From what has been said above, it is clear that, as a rule, this can not be affirmed; but what if a King or Prince be compelled to accept a pacification by the unjust arms of his adversary and by the fear of suffering greater and actually imminent loss if peace does not intervene? Would it be right for him subsequently to seize on this as a cause of new war, and regain at a more opportune time what he has lost? Just as 33 remedies are available in private matters where there has been justifiable fear, have Kings or Princes who have been similarly damned the similar remedy of a just war? To affirm this, might lead to dangerous consequences, although it may not lack present-day illustrations. But I think that it can not be admitted by the Law of Nations unless the following two conditions be

satisfied: (1) Utterly unmistakable injustice of the other side; (2) A greater danger manifestly, or with great probability, impending at the time of the pacification. What in those circumstances has been promised or, rather, has been extorted by unjust violence, ought not to have obligatory effect any more than promises to pirates or robbers made to obtain safety or to secure life or property.

34 In such a case, indeed, the war is being made on a new cause in its own way, namely, because the adversary is enjoying the advantage of the provisions of an evidently unjust and extorted peace; and if he does not, on this score, make amends consistent with what is right and just, there being no human judge between the parties to order redress of the loss caused and to put matters back where they were before the fear-extorted promise was given, the case may be submitted to war, as to the arbitrament of a Divine oracle. If, however, the justice of the cause of the former war was at least doubtful, or if the peace had been freely confirmed by the injured party after all danger was over, its validity is, I think, unchallengeable; otherwise, the public agreements of Kings and peoples could never attain security, and mankind would be left exposed to constant vicissitudes like those of war.

Let this, however, suffice for the present chapter.

CHAPTER XXIII.

Of "Fædera" in general—Treaties, Alliances, etc.—and
the Different Varieties thereof.

SUMMARY.

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| 1, 2. The wide meaning of <i>fædus</i> .
3, 4. The strict meaning of <i>fædus</i> .
5. Difference between Sponson and Treaty
of alliance; requisites of latter.
6. Who can make treaties of alliances.
7. Alliance does not absolutely involve a mili-
tary union.
8, 9. Ancient and modern ceremonials of
treaty-making.
10-12. Whether an alliance may be made with
a usurper.
13-15. Whether alliances with infidels are per-
missible.
16-19. Classification of treaties given by Me-
nippus, the ambassador of Antiochus:
wherein defective. Requisites of the
different kinds. | 20. Treaties of alliance are either on Equal
or on Unequal terms.
21-24. Limited and Unlimited alliances.
25. Alliances are either Real or Personal.
26-29. When are alliances Real, and when
Personal?
30, 31. Restrictive interpretation of treaties in
odious matters.
32. A Personal Alliance between a King and a
Republic.
33-35. Defensive and Offensive alliances.
36. An Offensive Alliance is not always
odious under the Law of Nations.
37. In doubt, an alliance is deemed to be de-
fensive.
38. How far a secret alliance is permissible. |
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We see in the classical writers that the word "*fædus*" is used in different senses. Thus, in Thucydides the ambassadors of Athens make objection to a declaration of war on them by the Spartans, that it is the rupture of "*fædera*," that is, of Peace. And in Livy, when Hannibal's approach was threatening Rome, Fabius Maximus declared his conviction that, as Jove had witnessed the rupture of "*fædera*" he would repel the enemy with the army that was round Rome. And elsewhere reclamations were addressed to the Carthaginians, when they sought for peace, that they had violated earlier "*fædera*." Now, in these and other like places "*fædus*" means "peace," because, strictly speaking, what prevailed between the peoples named was a Peace, and not a Treaty or Alliance.

At times, too, "*fædus*" means an oath or a vow. It is in that sense 2 that, in Vergil (*Aeneid*, bk. 12), Turnus says to the Latin King: "*fer sacra,
pater, et concipe fædus*" (Make ready the rites and frame the oath, my
father"). What Turnus was then proposing was to devote himself by the
solemn pagan ritual to conquer *Aeneas* or die.

But in its proper vernacular meaning, in which we use the word here, 3 "*fædus*" is used of a public agreement of Alliance, and is marked off from a Peace, wherein the contracting parties are bound only to a cessation of hos-

tilities, and not to an alliance of arms. This elucidates the advice given by Cnæus Cornelius to King Philip of Macedon, recommending him, "since he had obtained peace, to send ambassadors to Rome to beg for an alliance and friendship" (*Livy, History*, bk. 33); and also the reply of the Roman Senate to the request made by the ambassadors of Vermina, an African Prince, that the Senate would call him King, ally, and friend, namely, "He must sue the Roman people for peace before he could expect to be acknowledged King, ally, and friend; that it was the practice of the Roman people to bestow the honor of that title in return for great services rendered by Kings to them" (*Livy, History*, bk. 31).

4 But what, then, is the meaning of what Livy tells us (*History*, bk. 24), how that Hieronymus, King of Syracuse, after forming an alliance with Hannibal, sent ambassadors to Carthage to make a treaty consequent upon the alliance with Hannibal? If an alliance had been already made, how could one be made again? The explanation is, that Hannibal was not empowered to make a treaty and had no mandate to that effect from the State of Carthage. The earlier agreement, accordingly, was not *fædus* properly so called, but a Sponsion, as Grotius also notes (*De jure belli ac pacis*, bk. 2, ch. 15, § 3).

5 The chief difference between a Treaty (*fædus*) and a Sponsion is, that the latter binds him who makes it, but not his State; also that the solemn ritual which is usual when treaties are struck is not usually employed in a sponsion. We deduce, then, that in general there are three requisites to making a treaty of alliance: (1) Power of contracting parties, (2) Agreement for an armed alliance, (3) Solemnities confirmatory of the treaty.

6 The power required is sovereign power or its equivalent, as I said above in connection with clauses about peace and war. There is no doubt that a treaty can be properly made whether the makers have the power to make it in their own right, like Kings and Princes, or as a mandate from a Republic, though in the latter case the better opinion is that, because of the magnitude of the interests involved, a special mandate is necessary.

7 An armed alliance is a necessity in a treaty (*fædus*), as its individual and characteristic mark, distinguishing it from a peace and other public agreements. This armed alliance must not, however, be in general construed as absolutely involving a union of military forces; but they are also deemed to be allies in arms who are bound by the treaty, not to a mutual supply of troops, but, maybe on one side only, to a supply of money, foodstuffs, cannon, ammunition, gunpowder, and other apparatus of war. Thus Hiero, King of Sicily, who was called a conspicuous ally of the Roman people, helped them with the commissariat rather than with troops; and in our own day the Dutch were bound under the treaty of alliance to supply money for the confederate forces.

8 Again, under the Law of Nations, solemnities are usually employed in making treaties, in order to give greater stability to the agreement. These may take the shape of oaths or of imprecations against the breaker of the

treaty, and so on, the Romans, when striking a treaty, employing for these purposes *fecials*, with a *pater patratus* added as master of the ceremonies (*Livy, History*, bk. 9). At the present day these public agreements are 9 generally confirmed by being put into formal documents which are then exchanged; the treaties entered into by Kings or Republics are put into authentic form and exchanged. And until all this is done, the treaty is not reckoned fully and finally complete, as is illustrated by the treaty between Pope Clement VII and the Emperor Charles V, and by numerous cases of the present day.

This being premised, (1) the question comes Whether a treaty of 10 alliance can properly be made with a usurper. And as in the case of a peace, so in this case it can, especially if the people's consent is subsequently added, whereby the usurper's sway is expressly or tacitly approved. I should name Cromwell, in the Kingdom of England, and Basilicus, in the olden Empire of Constantinople, as examples hereof. And there is nothing inconsistent with this in the objection addressed by the consul Quintius to Nabis, the usurper of Lacedæmon, his words being: "We never contracted any friendship or alliance with you, but with Pelops, the rightful and lawful King of Lacedæmon" (*Livy, History*, bk. 34).

The question whether a treaty is to be interpreted as applying to a 11 usurping successor with whom the treaty was not originally made, is quite different from the question of the power to make a treaty with a usurper. Here, in my opinion, a distinction is rightly drawn as regards, on the one hand, the tyrant himself and the King or people making a treaty with him, and, on the other, the servient people or State. For, from the first point of view, there is no reason to doubt that even a usurper, although the people has not in any way manifested its consent to his domination, is bound by the treaty, and that the King or free people contracting with him is reciprocally bound. This is subject to the proviso that the object of the treaty is not an intrinsically bad one, as it would be, for example, if it directly aimed at the establishment of a usurpation. For, as it is unjust by the Law of Nations to 12 usurp sovereign power, so it is unjust to aid the usurper in his undertaking and to join forces with him against the lawful King or Republic. But from the second point of view, a treaty made with a usurper is null, and binds neither the ejected King nor the servient people, apart from their consent to the usurping rule.

(2) A second question is, Whether it is permissible to make a treaty 13 with infidels, like pagans and Mahometans, and others. Grotius (place named, ch. 15, § 8, onwards) discusses this question at length, showing by many examples from the history of the Jews that such a treaty, besides being permitted by the Law of Nature and of Nations, is not condemned by the Divine Law or forbidden by the Law of Moses or by the Gospel. But in § 11 he makes an exception of the case where such an alliance would very mate-

rially increase the strength of the infidel, and he contends that a treaty leading to that result must not be made, save in utmost necessity.

14 I approve of Grotius' rule that such treaties are not unlawful as a class, but I think that special causes and circumstances may make them unlawful. For example, the treaty of the Emperor Charles V with the Bey of Tunis against the Turks was lawful, but the treaty of King Francis of France with the Turks against the Christians was unlawful; because the latter enured to the hurt of the whole Christian Commonwealth (see Imperial Abschied of the year 1544, § *und demnach* and § *so achten wir*), but not so the former. It is also indubitable that the treaties made at the present day between the King of Britain or other States and Tripoli or other barbarous peoples, providing for trade and public safety, are lawful by every kind of Law.

15 If, however, a treaty of alliance with barbarians furthers any unjust cause, I do not think that it can be permitted even on the pretext of extremest necessity. Suppose that some King (or people), by acts of injustice and violence draws against himself the armed might of many States, and when, in course of time, he finds his affairs on the verge of ruin, he pleads necessity as an excuse for obtaining the help of barbarians by means of alliance with them: he will not be justified in this; for his unjust behavior, so long as he has not given redress to the persons injured by him, makes him himself the author of the dangers which overhang him, and so a treaty with barbarians will not be a just and lawful method of escape therefrom. But I should be inclined to apply a different rule to the case where a King or people makes a defensive alliance with infidels because he or it is being unjustly harassed by the forces of Kings or peoples of the same faith as he or it; for then both the origin and the intent of the alliance furnish ground of justification.

16 I leave now the consideration of alliances in general and proceed to explain the different kinds. Now, they are variously divided: (1) In respect of the efficient cause; that is, the contracting parties. From this standpoint, Menippus, the ambassador of King Antiochus of Syria to the Romans, said (*Livy, History*, bk. 34) that "there were three kinds of treaties by which Kings and States formed friendships with one another: one, when terms were dictated to a people vanquished in war; the second, when parties equally matched in war conclude a treaty of peace and friendship on terms of equality; the third kind is when parties who have never been foes meet to form a friendly union by a treaty of alliance"; and he subjoins in the same place a good account of the results of each of the three kinds.

17 Menippus applied all this to his own object, which was, to prevent the Romans from imposing over-severe terms on Antiochus in the treaty. To speak accurately, however, not every treaty is included in the three classes named. Grotius agrees in this criticism, and proposes an alternative principle of classification (place named, ch. 15, § 5). My own criticism in detail is, first, that by the Law of Nations a treaty on equal terms can be entered into even between non-equals, as in the case of the Jews and Romans (*1 Macc.*

(*bees*, ch. 8, v. 23), the matter being entirely dependent on the nature of the agreement. Secondly, it can not be denied that, even in peace, it sometimes 18 happens that parties of unequal strength form a treaty of alliance; what is there, in the fact that peace already has been made, to prevent a subsequent entrance on an alliance? Thirdly, they who go direct from war to a treaty and alliance are not necessarily either equally matched in the war or else in the relation of victor and vanquished; for it may be that the belligerents are unequal in arms and strength, but the stronger has not yet conquered the other. We have an example of this furnished by the Venetian Senate in the 19 Pisan War: it signified that the Venetian Republic was not averse from discussing the question of peace and an alliance with the Florentines, whom it had certainly not conquered, provided the Florentines would consent to treat otherwise than on the footing of equality. Now, such examples as these, which every age could supply, can not be aptly brought within the three classes named by Menippus.

It is, then, preferable to divide treaties, whether they be made in time 20 of peace or in time of war, into Equal and Unequal treaties, the former being struck on equal terms, while, in the latter, one side has under the agreement ampler rights, or at any rate a higher prerogative, than the other, as often happens where one side is much stronger and more authoritative than the other. In this connection we have the response of the jurist Proculus, in *Dig.* 49, 15, 7, 1, where he says that a free people is one which is not subject to the power of another, and that it * may be a member of an alliance under a treaty in which either equal terms are set up or the one people amicably recognizes that the other retains a superiority; the latter was the relation to the Romans, of their old allies.

A second main division of treaties is into Limited and Unlimited. This 21 depends on the framing and form of the treaty. If an armed alliance is provided for by a pact or stipulation without any restriction, so that, whatever enemies one member has or shall have, the same the other member will have, as in the aforementioned agreement between the Jews and the Romans, the treaty is Unlimited. If, on the other hand, some restriction is expressed, it 22 is taken to be Limited. Such limitation may take various shapes—either as to enemies or places; or the kind, measure, or limits of aid; or other details. The treaty between Aëtius and the Romans, on the one side, and the Visigoths on the other, against Attila and the Huns, was an example of a treaty limited as to enemies; so was that between Pope Nicholas V and the rest of the Christian world against the Turks. A treaty limited as to place or province is illustrated by the treaty between Pope Adrian VI, the Emperor Charles V, the Senate of Venice, and others, for the defense of Insubria and the protection of Duke Sforza. I have already given, above, instances of a treaty limited to a certain kind of aid, as where the treaty expressly says whether

* Here we follow the text of the Digest as amended by Mommsen, not that of Textor.—Tr.

the aid is to be in men or in money or in any other mode, and what the amount in any case is to be.

23 Here, it must be pointed out, incidentally, that an unlimited treaty either may be absolutely unlimited, as were the terms of the Romano-Judaic alliance, or may be unlimited, subject to an exception. The latter must not be confounded with a merely limited treaty. For a promise of aid against this or that named enemy and a promise of aid except against this or that named enemy are two unlike things. In the former case the obligation of the treaty operates only if the named power is the enemy; but in the latter the obligation operates against any enemy whatsoever except the one named, and the 24 promisor binds himself against all enemies save those he has excepted. In this way the Venetian Senate bound itself formerly to the defense of the Kingdom of Naples except against the Turks, whose enmity the Venetians did not wish to rouse, as Guicciardini tells.

I referred above to a treaty between King Henry VIII of England and King Louis XI of France which illustrates a limitation in the kind of help, and also to a treaty similarly limited as to province, that, namely, between Pope Adrian VI and Charles V, and others, for the defense of Insubria.

25 A third main classification of alliances is into Real and Personal. The former kind bind the successors in the Kingdom or Principality, but the latter primarily bind only the party contracting. This classification, then, should properly come under the effect of the obligation arising from the alliance; that is, how far it ought to be extended. Here the chief point to note is the different position of Kingdoms and Republics in this respect: the latter do not die, and so it would seem that they can not be bound by a personal treaty. Accordingly, the obligation of a treaty made by the Senate or Assembly of a Republic remains, despite the death of the individual Senators who composed the Senate or of the individual men who composed the Assembly, unless there was an express provision in the treaty to the contrary, which is hardly likely because of the excessive changeability and uncertainty that would ensue. The reason of this is, that the Senate and People are deemed to be one and the same, although many of the individuals who composed them, and possibly all these individuals, one after the other, have died and others have replaced them, as said earlier in another context.

26 On this showing, then, the alliances of Republics are real, while those of Kings, on the contrary, are not necessarily personal (see Grotius, *De jure belli ac pacis*, bk. 2, ch. 16). So the question remains, When are the alliances of Kings or Princes real, and when personal? Grotius, in the place named, holds that it must be determined by the words and subject-matter of the treaty, the alliance being held personal if these are odious, and real if favorable.

27 In opposition to this, Bodin (*De republica*, bk. 5, last chapter) thinks that, as a rule, the alliances of Kings or Princes are personal; for other unions and partnerships are also dissolved by death, and the force of the oath

whereby a treaty is affirmed does not extend to successors. Grotius, however, correctly replies, in the same place, that the rules which obtain in private partnerships are not the same as those in public partnerships, and that the oath which it is customary to superadd does not affect the substance of the treaty, but is only subjoined in order to give greater sanctity and strength to the bond. This answer may also be defended on the ground that, although an oath does not bind successors as an oath, that being plainly a personal matter, yet they may be bound by a sworn agreement by virtue of the contractual bond, as happens to the issue of women of rank who have renounced their inheritances, a topic discussed by us elsewhere.

It is in point here that, according to the tradition of the doctors, Kings 28 or Princes who enter into contracts bind their successors in the Kingdoms or Principalities (see Roland a Valle, vol. I, cons. I, n. 40, and cons. 13, n. 33, with the following cons. of that bk.; Suarez, aforenamed 9, n. 40; Tiraqueau, *Repetitiones* on *Cod. 8, 55, 8*, at *donatione largitus*, n. 13, onwards; Gabrielis, *Communes conclusiones*, bk. 3, tit. *de jur. quest. non toll.*, concl. 5, n. 2).

What does all this lead to? To this, that the alliances of Kings or 29 Princes are not personal unless so expressed, or unless there is a sure presumption to that effect; because, in doubt, a King is presumed not to have had himself alone in contemplation, but, for the advantage of his realm, to have meant to bind his successors. So Ziegler and Felden hold in their *Observations on Grotius* (place named).

There is reason, however, in Grotius' contention that, where the subject- 30 matter of the treaty is odious (as where the treaty provides for an attack on another), the treaty of a King or Prince should be reckoned personal. I would go further, and say that even in defensive alliances there must sometimes be a variation from the rule. Take the case of a very one-sided agreement, as that one side must contribute excessively to the defense of the other by sending men, provisions, money, etc. Should not such an agreement be restrictively construed, if in doubt? And what if the defense be unjust? Must we not say the same as of an offensive alliance; namely, that unless it be otherwise expressed, the King or Prince so contracting must be taken to have thought of himself only, and not to have intended to bind his successors?

We certainly have in Roman history the notable instance of Perseus, 31 King of Macedon, who denied that he was bound to the Romans by the treaty of his father Philip, and therefore held that a fresh alliance must be made with himself. Whether this contention was just or not, can not perhaps be discussed for want of exact knowledge of the circumstances and of the form of the alliance, any more than can the cases of the Fidenates, Latins, Etruscans, and Sabines who left the Roman alliance.

Now, what if a King makes with a Republic an alliance which, on his 32 side, is personal? I answer that, on the side of the Republic, it does not become personal, there being nothing in the case to alter the rule that a

Republic has no concern with that kind of alliance. All the same, it does not last beyond the King's life; for if put an end to, it must be understood to be at an end as regards both sides. That the Republic should remain bound to the alliance, although the King's successor is not, does not command one's assent.

- 33 The last classification of alliances relates particularly to their final cause, and is into Defensive and Offensive. The former are as a rule favorable, the latter odious and, unless in accordance with the rules of lawful war, unlawful. For this reason, even in the Romano-Germanic Empire defensive alliances are allowed to the States in Golden Bull, tit. 15; Instrument of Peace, art. 8. Offensive alliances are not treated in the same way in Imperial Constitutions; and this is not to be wondered at. For, if war is forbidden between the States of the Empire, aid in war must be equally forbidden also; it is, therefore, lawful to make an offensive alliance for just cause against outsiders, and a defensive one even against other States of the Empire. This is the general rule; for where a Prince or State of the Empire may take up arms, it will be allowable to form an offensive armed alliance. An example of this was furnished by Henry the Lion, and there were others in the last century.
- 35 It must undoubtedly be insisted that neither a defensive nor an offensive alliance of a universal kind can be made within the Empire, save by the Emperor with the assent of the Estates; these are, however, matters of positive law (*§ gaudeant, aforenamed*).
- 36 Again, I think that by the Law of Nations the subject-matter of an offensive alliance is not without qualification and exception to be held odious. For what about alliances formed against barbarians, Turks or Tartars, and for the overthrow of usurpations? War against the peoples named being not unjust, and almost hereditary with Christians, offensive alliances against them will not be unjust, other things being equal. I say "other things being equal," because a peace which Christians have promised must be observed even if with infidels, unless they have given new and sufficient cause for breaking it. Accordingly, it was badly done when, in defiance of the sworn peace, Pope Nicholas V and King Ladislaus of Hungary and other Christian Princes entered into an offensive alliance against Amurath, the Sultan of Turkey.
- 37 Certainly, if an offensive alliance is struck only for the purpose of enlarging the boundaries or territory of the realm, as the alliance in days of old between Philip, King of Macedon, and Hannibal, it is quite obvious that the object of such an alliance is odious, and so in similar cases. Hence, it is easy to see that in doubt an alliance ought to be construed as defensive rather than offensive, the former kind being as a rule valid and more favorable; aye, and if the language used by the contracting powers, they having right to make alliances, can be applied to both kinds of alliance, there is nothing to prevent the assertion that an offensive and defensive alliance has been formed. But whether and to what extent, as a matter of interpretation, this or that

kind of alliance is to be deemed contracted, is one of the topics of the following chapter.

In this present chapter, we will mention one more topic only—Whether 38 and to what extent a secret alliance is allowable. Briefly, the answer is that, if the contracting parties are not hindered by any prior treaty or other like bond, a secret alliance is permitted, no one being bound to disclose the secrets of his State. But otherwise, secret alliances are not allowable; and in their number I think that the secret treaty of Pope Clement VII against the Emperor Charles V must be placed, it being in effect a base and fraudulent breach of right for any one to plan a secret treaty to the hurt of a true ally. It can not be doubted, therefore, that by the Law of Nations no obligation arises from an unlawful later agreement of such a kind.

Let this much of a general character be said about treaties and alliances, and their different varieties.

CHAPTER XXIV.

Of the Obligation arising from a Treaty of Alliance, and the Interpretation of that Treaty.

SUMMARY.

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| <p>1-3. Reproof of the assertion of some pseudo-politicians about the rupture of treaties.</p> <p>4-9. When the word "ally" is used without qualification in a treaty, it includes future allies.</p> <p>10-13. Grotius' opinion to the contrary controverted.</p> <p>14. In case of doubt allies can not be attacked.</p> <p>15. A treaty which takes away belligerent rights must be construed to refer to an offensive and unjust war.</p> <p>16. Whether an undertaking to preserve a city applies to the buildings or to the inhabitants.</p> <p>17. How words are to be taken in the interpretation of a treaty.</p> <p>18. Whether a treaty made with a lawful King binds his usurping successor.</p> | <p>19. A party to an offensive alliance is not bound to aid in an unjust war.</p> <p>20-22. Distinction between favorable and odious treaties.</p> <p>23, 24. An offensive alliance against the invader of another realm is favorable.</p> <p>25. The presumptive interpretation of treaties, apart from the words.</p> <p>26. The difference between extensive interpretation and gathering the general sense.</p> <p>27. When extensive interpretation of a treaty is resorted to.</p> <p>28. Whether a clause in a treaty binds the promisor in case of moral impossibility.</p> <p>29, 30. The instructive application of Roman Law in the interpretation of treaties.</p> <p>31, 32. Whether writing is necessary for the completion of a treaty.</p> |
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I Just as obligations arise from private agreements, so they also spring from the public agreements of Kings and peoples; and one especial source is from treaties of alliance, whereby the parties are reciprocally bound to aid each other. And so the assertion is utterly false which some pseudo-politicians whisper into the ears of Princes; namely, that the obligatory force of treaties of alliance is to be gauged by expediency; that they need be observed only as long as they are advantageous; and that if novel political situations arise and the basis on which a hope of gain was built crumbles away, they may be annulled and dissolved. To such persons you will rightly say with Cicero (*Offices*), "Nothing is really expedient that is not upright," as he shows there at some length. Those parasites who are not ashamed to deceive Kings and Princes with the false hope of making dishonorable profit out of a treaty are the basest type of man. For where can good-faith be looked for among mankind if not in these exalted places and in these weighty transactions? Ought not such accursed politicians as these to be banished from the life and assemblies of men? Otherwise no hope will remain for the preservation of human society, resting, as it does, on the support of good-faith. These persons would have this good-faith broken up and got rid of, preferring that revolting kind of faith which allows the neglect of treaty-obligations; and in

the end the inevitable result would be to make men, who, according to Aristotle, are by nature social, not men but beasts, by the dissolution of the foundations of human society. Let us rather banish, especially from the Christian world, this most hurtful error about the discretionary observance of treaties, and their adaptability from hour to hour to the changing forms of expediency; it is an error which strikes at the root of true treaty-obligations. Now, unless I wholly mistake, the inherent force of treaty-obligations appears clearly from what has been said, and has the approval of all judicious persons. So the main part of the discussion of the interpretation of treaties centers round those articles which are ill-expressed.

Just before the beginning of the Second Punic War, the Romans complained of the attack made on their allies, the Saguntines, by Hannibal and the Carthaginians in violation of the treaty. The latter answered that, at the time when the treaty was made, the Saguntines were not allies of the Romans, and accordingly were not covered by the treaty. This question about the interpretation of the treaty led to a renewal of the war. (Livy, *History*, bk. 21.) The Romans deserve a verdict in their favor for two reasons: first, that the allies of each side were excepted in the treaty generally and without restriction (that is, they were not to be attacked by the other side); and second, that no breach of the treaty was committed by the formation of new alliances, and that it would be unjust for these new allies, thus received into the Roman protection, not to be defended. Accordingly, our view is that, so far as persons are concerned, a treaty must receive a *bonæ fidei* interpretation, and any general clause in a treaty referring to the allies of both sides must be construed to include both present and future allies.

But the question Whether allies may be justly attacked by the other side, must not be treated as an empty one. One of the Carthaginian Senators put it neatly to the Romans as follows: "I think that the question is not Whether Saguntum was attacked by private or by public authority, but Whether it was attacked rightly or wrongly." For if an attack of one side upon the allies of the other is a just one, the defense of them will be unjust; if Saguntum was rightly besieged by the Carthaginians, the alliance with Saguntum did not bind the Romans to go to its aid. The good-faith of an alliance should not be extended to what is unlawful.

You may retort that even a just attack is barred, if a treaty provides that our allies are not to be attacked; for otherwise the agreement would produce no effect, seeing that, even apart from it, an unjust one may not be made on our allies. My answer is a denial of the consequence. For although it be a breach of the Law of Nations to make an unjust war on another person's ally, yet, unless there be an agreement which so includes allies, the attack is not, strictly speaking, a breach of a treaty—and it is the interpretation of treaties which is our present subject—nor does the attacking party render himself liable thereby to the pecuniary penalty for perjury which is stipulated in the treaty.

- 7 Let us consider how Grotius arrives at a contrary result (*De jure belli ac pacis*, bk. 2, ch. 16, § 13). In that passage, Grotius deals at some length with the present question, Whether future allies are included under the general word "allies"; and he takes the negative view, contrary to Livy. The essence of his argument is, that we construe odious provisions in treaties restrictively. Now, the provisions about the rupture of an alliance and for depriving parties of their natural freedom to use force against those whom they believe to have injured them, are odious provisions. In these matters, therefore, interpretation must be restrictive, by construing the word "allies" as covering those only who become allies subsequently.
- 8 All the same, if we look at the whole matter properly, Grotius has not succeeded in impugning Livy's opinion. To make the matter clearer, let us provisionally accept Grotius' distinction between what is unjust and what is repugnant to the treaty. Now, the question is not Whether, according to the Law of Nature and of Nations, one member of a league may make a hostile attack on the ally of another member; but Whether, by such an attack on one who becomes such an ally after the formation of the league, he violates the treaty. Grotius says, No; but I stand in Livy's footsteps and think the right answer is Yes, my reason being as follows: Provisions relative to defense under the treaty are favorable and should be extensively interpreted; now, this question about the interpretation of the word "allies" when used generally, relates to defense under a treaty; therefore it is favorable and to be interpreted extensively and in consequence future allies also come within the word. The major premise holds true, because defense is favorable and to be extensively construed in the interests of mankind. The minor premise, in the same way, is undeniable, there being no reason for including allies within a treaty of alliance other than public safety and defense. Therefore the conclusion can not be denied. And the answer to Grotius' argument is, that provisions relating to the breach of treaties, however much they be odious in themselves, are not to be reckoned odious and entitled to restrictive interpretation in the interests of the party committing the breach. When that distinction is taken, Grotius' minor premise can be denied or the whole argument conceded, it being absurd that defense under a treaty of alliance should be restricted to present allies, and that the power of making war, which in other respects is *stricti juris*, should be extended to a war against future allies.
- 10 The examples given by Grotius do not seem in point. For, as regards the agreement between the Romans and Carthaginians in the time of Pyrrhus, this rather makes against Grotius, seeing that, if a special agreement ought to have reserved to the Romans and Carthaginians, who were at that time united by an alliance, the right of sending help to their allies, that right would seem not to exist by the mere Law of Nations apart from the agreement; but Grotius presupposes that this right did exist just before the commencement of the Second Punic War.

I admit the soundness of the distinction drawn by Polybius in the case of the Mamertines; namely, between aid that it was proper for the Romans or any other peoples to send and help that was lawful under a treaty. It is of the latter kind that I am now speaking. This case, then, does not advance Grotius' argument at all.

The same may be said of the case of the Corcyraeans given in Thucydides' *History*. For Livy agrees in what the Corcyraeans say; namely, that it was lawful for the Athenians to procure new allies, without any breach of the preexisting treaty between them and the Spartans. Our question, however, is whether future allies are included within the general word "allies" in a treaty; and there is nothing in this case which assists Grotius' opinion on that question.

As regards the passage from Justinus, bk. 3, I reply that it illustrates matter of fact and not the Law of Nations; and, further, that it is foreign to our question, it being one thing to ask whether it is permissible to break a treaty as regards one's allies, and another whether future allies are included within the unqualified use of the word "allies."

Lastly, there is no force in the argument based on the agreement between the Athenians and Philip that the States of Greece should be free, and that, if any one offered them violence, any of the parties included in the peace might defend them; it, too, is not on all fours with our question. For, a question about the freedom of defense contained in a public agreement is different from the question about the interpretation of the word "allies" when used generally in a treaty.

The whole thing clearly comes back to the aforementioned cardinal distinction, Whether the attack on the new allies is unjust or just, there being a violation of treaty in the former case and not in the latter. And this is especially so, seeing that Grotius' argument, founded on the assumption that men are naturally free to use force against those who have injured them, presupposes the justness of the ground of the attack on those who have become the allies of the other party subsequently to the treaty.

But what in a case of doubt, as where it is an old claim that is being made against these new allies of the other party? The same considerations will apply as I used above, where the justice of a war is doubtful: unless he who is about to attack these new allies has the greater right, his attack will be unjust and a defense of them by the other party will be just. In that case, I think that an attack so made on the allies overbears the treaty.

I readily grant what Grotius (place named, § 14) adds about an unequal treaty; namely, that a clause depriving a party of belligerent right (such as the Romans in olden days often inserted when they were victorious) must, in doubt, be construed to refer to an offensive war, not only on the principle against restricting liberty, but also because natural defense ought not to be held excluded on the interpretation of a doubtful clause. A defensive war would in such a case be held lawful notwithstanding agreements and oaths.

16 Next, is an agreement for the preservation of a city (*civitas*) to be taken as referring to the aggregate of inhabitants, or to the city itself and its buildings? It is not off the point that the word “*civitas*” is employed to designate the citizens; still, for the avoidance of quibbling, the opinion of Grotius (place named, § 15) is the probable one, that it is not the mere aggregate of citizens that is meant, but the city itself also, it not being likely that the other contracting party would have agreed to a surrender, in a treaty of this kind, unless he had believed that the aggregate of the citizens would be safe on the actual site of the city. And so the Romans who had agreed with the Carthaginians that Carthage should be safe, and afterwards ordered them to emigrate, can hardly be acquitted of a captious interpretation.

17 From this it appears, in short, that Grotius' rule is correct in itself, as propounded in § 12, place named, that the words of non-odious clauses are to be taken in the sense generally justified by popular usage, and, if such usage is manifold, according to that sense which is widest; but as regards the quality of a person, they must be construed as terms of art, and they must not be taken in another than their proper native sense unless this would lead to an absurd result or the agreement would be made useless thereby (*Covarruvias, Variae resolutiones*, vol. 3, ch. 3, n. 5).

18 And what about the invader of a foreign kingdom? Does a treaty made with a former legitimate sovereign or with a free people bind him who has taken his place by force? The answer, in accordance with what has been said above, must be in the negative; because, although a usurper of that sort acquires thereby possession of the kingdom or dominion, still he does not, by his violence, succeed to the rights of the kingship or over the people unless a subsequent fresh assent of the King or people has supervened. This is sufficiently shown in the speech of Quintius to Nabis where he said, “We have no friendship or alliance with you, but with Pelops, the right and lawful King of Sparta,” and, a little later on, “Come then, drop a popular style of speech, and speak as a usurper and an enemy.” This shows that Nabis was not bound to the Romans by the treaty made by Pelops, the obligation of a treaty being ordinarily reciprocal.

19 As regards odious provisions, a restrictive interpretation must doubtless be adopted; and so he who is subject to the obligation of an offensive alliance is taken to be not bound to render assistance in an unjust war, however general the language of the treaty may have been. It was on this ground that, in the preceding chapter, I said that an alliance of this kind must be construed as personal, and not real. For the more thorough investigation of this matter, it would be worth while to draw a better distinction between favorable and odious provisions.

20 Some matters, then, which as a class are favorable, are in the specific case odious, and *vice versa*. This is due to the special circumstances of person, thing, aim, and such like, which may be present. These points must be well observed, so that we do not infringe the rules of good interpretation of

treaties and public transactions. For those favorable matters which, by reason of special circumstance, are odious, do not fall within the rule requiring a wide interpretation in non-odious matters; nor, on the other hand, do the matters which, as a class, are odious, but which, by special circumstances, become favorable, fall within the rule about odious matters.

For example, natural liberty is, speaking generally, a favorable matter; 21 but if the aim to which it be directed is an assault on other men, it takes on an odious character, and provisions about it must be restrictively construed.

Or again, defense is, in itself, of the favorable class; but if a defensive 22 alliance be made with barbarians, Turks, or Tartars, contrary to the weal and interests of a Christian State, it will for the like reason become odious, since, as Florentinus says in *Dig.* I, I, 3, "Nature has created among us a kind of kinship which makes it wrong for one man to ensnare another."

If, however, an offensive league be formed for the lawful end of defending our allies or putting down a usurpation, etc., there is no hindrance to our calling it on that ground a favorable matter, which, like all *bonæ fidei* transactions, must be liberally construed. Archidamus, King of Sparta, must have had this in his mind when he urged his citizens to join the allies, both Greek and Barbarian, in an attack on the Athenians if they did not voluntarily make amends for the wrongs they had done to the allies. "No one," said he, "who like ourselves has experienced the wiles of the Athenians, can be blamed for using in his defense the forces not only of Greeks, but of barbarians too." (*Thucydides, Peloponnesian War*, bk. I.) You see he calls it a matter of defense when the discussion is about declaring war on the Athenians, who were taken to be in the wrong in not making amends for wrongs which they had done, especially since they would be a menace to the liberty of Greece if their behavior was not timely checked by an offensive league.

This shows that offensive alliances against the invader of another realm 23 are favorable; and this is so not only where the task in hand is the recovery of a lost kingdom—as in the alliance between Ferdinand, King of Aragon, the Venetian Senate, and Francesco Sforza, Duke of Milan, against King Charles VIII of France, who had seized the Kingdom of Naples—but also 24 where the allies have made their alliance in order to lessen the power of a common assailant or enemy. For it is not enough to have recovered now what has been lost, unless the enemy is deprived of the means whereby he may without difficulty do fresh injury. And he who is put to his defense through his own fault, by reason of a previous unjust attack by him on others, ought not, by the Law of Nature and of Nations, to enjoy the privilege of defense which is unjust as long as—and consequently an attack on him is, on the other hand, just and favorable as long as—full reparation is not made by the assailant for the loss already caused, and security is not given for the future, in accordance with what I have said above on the topic of war.

One of our remaining topics is the presumptive interpretation of treaties, 25 apart from the force of the language used. These presumptions are founded

on the reasons for making the treaty, and interpretation by means of them is either restrictive or extensive (Grotius, place named, ch. 16, § 20). A restrictive use of a presumption is the general rule; a presumption is employed extensively only where there is cogent ground for thinking that the parties only contemplated the reason referred to above for making the treaty. See Grotius (place named). He takes the instance of an agreement that a certain place is not to be surrounded by walls, made at a time when there was no other method of fortification. Now, the word "walls" does not strictly cover ramparts. If, however, the sole cause and adequate end of this agreement was that the place in question was not to be fortified, Grotius holds that extensive interpretation must be resorted to; that is, the party who is so bound not to fortify is taken to be bound not to surround it with ramparts.

- 26 This instance may be accepted as sound; but the other instances adduced by the same author (§ 25) do not strictly illustrate extensive interpretation, but rather the rule that general expressions are to be so construed. For there is undoubtedly a great difference between extensive interpretation and the general sense of any given rule or doctrine: the former moves from like case to like case (*Dig.* 1, 3, 12); but the general sense depends on the proper meaning of the words, so that general expressions are interpreted generally. This principle of interpretation operates in criminal and in odious matters; but I deal with this topic elsewhere.
- 27 As regards the subject-matter of agreements and of treaties in particular, the rule not to resort to extensive interpretation strictly so called must be followed, unless some general, sole, and adequate principle is enunciated in the agreement, from which it satisfactorily appears that the parties intended to bind themselves in like cases of this kind; for a proposition that is withheld in the mind and not expressed in the agreement has no operation.
- 28 A further question is, Whether a treaty continues to bind the promisor with obligatory force even in a case of moral impossibility. Grotius seems to say No, according to § 25 (place named); yet he expressly says in § 27 that a party who has promised aid to an ally is excused as long as he has dangers to meet at home, and to the extent that he requires his troops himself. This latter opinion is certainly sound, and so the other passage in Grotius must be construed as not referring to a case of necessity.
- 29 What of the Roman Law? Do its canons of interpretation apply to the public agreements of Kings and peoples? If we are speaking of those canons which have the force of Law and bind contracting parties, Grotius is probably right (ch. 16, § 31) that Roman Law is not to be adopted as a standard any further than the conduct of the peoples of the world show that
- 30 it is received by them as Law of Nations. If, however, we understand the question to refer simply to the persuasive and probable aspects of the interpretation of treaties, an affirmative answer is correct although Roman Law is not received as Law, because there is a balance of probability on the side of that King or people who can claim the support of the Roman Law, a system

which, by the consent of nearly all mankind, is uniquely just. In this connection we have the remark of de Thou (preface to his *History*), that the whole (cultured) world was Roman, so that the legal pronouncements on a case can easily be ascertained by the use of Roman Law as a Law of Nations.

Lastly, it may be asked Whether a treaty binds before it has been completely drawn up in writing. Grotius (placed named, § 30) thinks that, in this business, writing is only evidence, and not the substance, of the contract. Now, in private affairs I grant that principle; and in public affairs I should hold the same view, at any rate where the treaty is directly negotiated by principals, as we read, in *Maccabees*, was the case with the treaty between the Romans and the Jews, a treaty inscribed for a memorial on brazen tablets. But this can hardly be accepted as the rule nowadays, where a treaty is 32 negotiated by ambassadors and plenipotentiaries; for not only writing, but also an exchange of copies of the treaty, is required, or some other thing which indicates that the last stage has been duly arrived at, and that the treaty is now complete and has been approved by the sovereigns in person, in accordance with what I said above.

Let this suffice on our present topic.

CHAPTER XXV.

Of the Renunciation and Dissolution of an Alliance.

SUMMARY.

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| 1. An ally who withdraws from an alliance at an inopportune time and not for a cogent reason, breaks the Law of Nations.
2. The dissolution of an alliance of several members requires unanimous consent.
3, 4 Whether one of confederates can make a separate peace with the enemy.
5, 6, 8 Personal alliances can be dissolved separately by one of the allies. When?
7. The perpetuation of an alliance in extreme ill-fortune is ascribed to virtue.
9. An individual member not allowed to dissolve a real alliance by a separate peace.
10-12. Whether it is permissible to help a former ally without breach of the peace.
13. How far a party renouncing an alliance is discharged thereby.
14. The contents of an alliance ought not to be divided by a renunciation without the consent of the other party. | 15. Difference between treaties and private agreements in respect of stipulation about time.
16-18. When, and from what time, an alliance may be deemed to be renewed.
19. A renewed treaty is a separate thing from its predecessor, but in case of doubt comprises all the points thereof.
20. The renewal of a continuing treaty, or of one contracted without a delimitation of time, does not constitute a separate treaty.
21. Whether, and to what extent, treaties are annulled by non-use.
22, 23. A personal alliance is dissolved by death; but the death of one member does not dissolve it as regards the others.
24. Real alliances do not end by the death of the contracting parties, but by a change in their status.
25-28. To what extent this is to be applied. |
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I There is no work of man so stable that it can not, for good cause, be undone and dissolved. This undoubtedly holds of the alliances of Kings and peoples, the duration of which is—until they are put an end to for just cause. Now, all judicious persons agree that these causes are not to be measured by the wit of any one man or on considerations of mere expediency, which may assume a new shape as time wears on, but rather by the equity of the Law of Nations. For, whether an ally expressly withdraws from an alliance without really cogent and just cause, by an inopportune renunciation of the rights and duties of the alliance—as Syphax did with the Roman alliance—or whether for some irrelevant and inadequate reason he denies the duties which are incumbent on him in virtue of the alliance—as of old the twelve Roman colonies did in the Second Punic War, and as in the last century the Italian allies of the Emperor Charles V did—it is wrongly done and in despite of the alliance. But we are speaking of a lawful renunciation: and, to begin with what is certain, there is no doubt whatever that an alliance may be dissolved, even without any reason, by the common consent of the confederated members, because the same principle which leads to this in private partnerships holds also in public ones; namely, an intent to the contrary, of the contracting parties, which brings about the destruction of the obligation on each side.

This is subject to the proviso that, when there are several federated members, they all assent, the matter being one of those where the special rights of each individual are taken into account. And so a vote of the majority to retire from the alliance does not bind the minority, or even a single member who prefers to abide by the alliance. So the unanimous consent of the federated members is required, and this by mere Law, even if there is no clause in the document such as: "This alliance is not dissoluble, save by common consent."

There is more doubt about the case when renunciation takes place against the wishes of a member. This certainly is not allowed by the Law of Nations without good cause, whether the renunciation be by express words or by conduct, as, for instance, by making a special private peace with the enemy. What, then, is to be said? Is it the rule that no member of an alliance can make peace with the enemy without the consent of the other members? Undoubtedly this can not be asserted nakedly. Otherwise, if alliances are by Law indissoluble until the end of the war, what would be the good of such a clause as: "No member is to make a separate peace with the enemy"? We had an instance of such a clause in the alliance between King Ladislaus of Hungary and the other Christian Princes against Amurath the Turk. So public usage clearly shows that Kings and peoples construe treaties of alliance in such a way that the power to make terms with the enemy separately is not excluded.

Thus, in the war with Antiochus, peace was made with him without including the Ætolian allies. So, also, in the last century King Francis I of France made a peace with the Emperor Charles V to which the representatives of Venice and of the league of Francesco Sforza were not admitted. And many instances of leagues of our own day illustrate the same thing; but, mindful of Tacitus' warning not to judge what is too close, I do not propose to discuss them. The conduct of King Francis, indeed, may be said to have been guided by opportunism rather than by the Law of Nations, if there is truth in what Guicciardini (*History*, bk. 19) writes of him; namely, that he had expressly promised his allies not to make peace with Charles V, but broke his engagement in order to get back his sons, who were hostages.

Now, as to our topic: we must here distinguish, in addition to the agreements that are to be kept, the different kinds of alliance. The personal kind can be dissolved by any one of the members separately, unless there is an arrangement to the contrary. The reason is, that in such a case it does not appear that the member has bound himself up to the end of the war. But the renunciation must not be effected at a highly inconvenient time or fraudulently; the whole thing is to be judged according to the circumstances.

Thus, if the member's State is endangered by the alliance, so that the continuance of the personal alliance would do him much more harm than good, that seems a sufficient cause for his making a separate arrangement; for if, as I said above, following Grotius, it is permissible not to send help to an ally if one is in sore need of it oneself, it will much more be permissible for

a member of a league to provide for the safety of himself and his State by making terms with the enemy, and to put an end, by a separate peace, to an alliance which would be almost fatal to himself and of little use to his ally.

7 For, what we find commended in Tacitus (*Speech to the Seditious Soldiery*)—how that the old allies of the Romans often endured the wasting of their lands and the destruction of their cities, and all extremities, rather than make terms with the enemy—must be set down to their good-faith and social virtue, or to a special obligation arising from agreement, or to the special terms of the alliances. And in sacred history (*Book of Joshua*), the Canaanites had no just cause for making war on and besieging the Gibeonites in the fact that the latter had made a separate peace with the Israelites, seeing that the Gibeonites do not appear to have been the allies of the Kings of Canaan or at any rate there was no such alliance as would preclude the making of a separate peace.

8 The question is really a moral one; for we would not be thought to hold that an ally may drop the bond and good-faith of an alliance for any light cause whatever. That erroneous opinion has already been sufficiently exploded above. He can do so only when matters have come to such a pass that, by the manifest intention of the contracting parties, they would not wish any longer to be bound to one another by the treaty of alliance. This we may take to be the probable intention of the parties especially where there are the two conditions mentioned, namely, that the one ally can be of little or no use to the other and that he will be seriously damaged by the continuance of the alliance; for the aim and end of the union agreed on, namely, the safety and preservation of the parties by means of their joint strength, can not be attained in circumstances where the despatch of assistance would be very hurtful to the one and of little or no good to the other.

9 The bond of real alliances is a still closer one, and can not, as a rule, be undone by a separate peace, since the parties make an enduring obligation and are held to have intended to continue bound by the treaty up to the end of the joint war.

But some one may ask, Why all this discussion, seeing that it is clear in more than one example that a separate peace may be made and at the same time assistance be given under the treaty to the former ally? And if this be allowed, a separate peace with the enemy is consistent with the treaty with the former ally.

10 It is not so, however. Some of these cases do not illustrate the application of Law, but were determined by the circumstances. There is no doubt that he who helps your enemy in war is your enemy. “Not only will you be the enemies of these allies,” say the Corinthians to the Athenians (Thucydides, *The Peloponnesian War*, bk. 1), “but to us also on behalf of the League; for if you send forces to help the Corcyraeans, you must be crushed as well as they.”

After the fashion of these Greek States, the Romans also sent an 11 embassage to King Philip of Macedon to remonstrate, among other things, that he had sent 4000 troops over into Africa under the general Sopater to the assistance of the enemy. (*Livy, History*, bk. 30.) And subsequently when, after the close of the Second Punic War, Hamilcar, the Carthaginian, offered himself as leader of a Gallic insurrection against the Romans, they despatched another embassage into Africa to the Carthaginians, charged to say, "that their countryman, Hamilcar, having been left in Gaul (either with a part of the army formerly commanded by Hasdrubal, or with that of Mago—they did not with certainty know which), was waging war contrary to the treaty; That he had excited the armies of the Gauls and Ligurians to arms against the Roman people; That if they wished for peace, they must recall him and give him up to the Roman people." (*Livy, History*, bk. 31.)

All the same, it would undoubtedly be a wise precaution to insert a clause 12 in a treaty or a peace, "that neither party is to help the enemies of the other with money or troops or provisions, etc." This would make it clearer that if anything contrary was done, the treaty was broken or the peace was violated. Accordingly, in addition to the old formulas of Roman treaties, an example is extant in the *Instrument of Peace between the Emperor and France*, at *et ut eo sincerior*, where we read that the friendship between the Emperor and the King of France was consolidated by a reciprocal agreement and obligation of this kind about each not rendering assistance to the enemies of the other. Where, however, despite a peace or treaty, it is to be allowable to send aid to the enemy, this ought to be the subject of an express agreement, as in that same passage "*et ut eo sincerior*," towards the end, where it was provided that the States of the Empire might send help beyond the limits of the Empire to the King of France or of Spain without any breach of the Germanic Peace with those crowns.

What we are speaking of is a tacit renunciation of a treaty. This must 13 be distinguished from a rupture; for, although the rupture of a treaty may take place tacitly and by conduct, yet this must be construed as affecting, not the party who makes the rupture, but the other party, his ally, in such a way, that is, that the latter, if he so choose, is freed from the treaty, but not the former if the latter be unwilling, as has been said above in its proper place. But a renunciation such as we have been dealing with so far, if made at a proper time, releases the party who renounces, whether it be express or tacit.

And what about a renunciation made at an improper time? I think the same applies to it as to a rupture; namely, that the party to whom the renunciation is addressed is discharged, but not the party who makes the untimely renunciation: the principle of the two cases is the same.

And what if a party renounces, not the whole but only a part of the 14 treaty, being ready to observe certain of its provisions? It all depends, as in the case of a rupture, on the wishes of the other party; he can not be compelled to accept a severance of the points or heads of the treaty, each one of which

has its own binding force, as Grotius says (*De jure belli ac pacis*, bk. 2, ch. 15, § 15).

15 Again, a treaty is dissolved by the lapse of the time named; for if the time of its duration is expressed in it, the parties were obviously unwilling to be bound beyond that time, and its obligation must end with the lapse of the time. So a different rule obtains in public treaties and in private agreements: in the latter, a day from which the obligation is to begin may be fixed (*Inst.* 3, 15, 2; and *Dig.* 45, 1, 41), but not a day up to which it is to exist, an obligation not being contracted up to a certain time (*Inst.* 3, 15, 3; and *Dig.* 44, 7, 44, 1), although suit on one which is so contracted may be met by a plea of an undertaking not to sue (*exceptio pacti de non petendo*) (texts cited above). But this subtlety does not operate in the public business of nations, the obligation of a treaty ending automatically when the period named, if any, has elapsed.

16 That is the case where, at the expiry of the period, the treaty is not renewed: in case of doubt, there should be no presumption in favor of renewal, unless this appears from the expressed wish of the parties or at least from their subsequent acts, these being inconsistent with everything except a renewal of the treaty (Grotius, place named, ch. 15, § 14). Grotius, however, does not explain what kind of acts these would be; and, if we follow Baldus (*De pace Constantiae* (?), at *item societatem*, n. 2, quoted by Decio, *Cons.* 407, n. 7), express renewal is required, especially where the earlier alliance had been made by stipulation. As long as this opinion holds, there will in consequence be no room for acts significatory of a tacit renewal of the agreement.

17 But the reasons of Baldus are hardly of sufficient weight to exclude, by the Law of Nations, tacit consent as a mode of renewing alliances; for the Law of Nations does not recognize these subtleties about stipulations, but looks rather to the genuineness of the consent, whether that be expressed in words or shown by acts. I think, then, that there are acts which have this effect; for example, if, after the expiry of the treaty, one ally demands help under its terms, and the other, though aware that the period has expired, grants it. This is hardly capable of any other interpretation than that the parties, by such request for, and grant of, help, have given fresh consent to the treaty, and that it is renewed.

18 In my view, however, the renewal would date, in such a case, from the time of this fresh consent, and not retrospectively from the time when the first treaty lapsed, unless something to the contrary is clearly apparent. This is my reason: retroactive consent is a fiction of the Civil Law which does not obtain in the Law of Nations in case of doubt. Accordingly, if two Kings or States have made, for example, an alliance for fifty years, with a proviso that, every year, for the purposes of their common interests, one party must supply the other with troops and a certain amount of money and corn and arms, and then, in the third year after the fifty years' period has elapsed, they

renew the treaty, the ally concerned is not bound to supply money or corn or other things for the two intervening years in virtue of the agreement in the former treaty. This is worth noting.

So I deduce that an alliance which is renewed after the lapse of the 19 agreed-on period is a different thing from the first, seeing that this had been extinguished on the expiry of the named period, although in doubt its terms would be assimilated to those of the first alliance. Accordingly, a general renewal includes within it all the provisions of the former treaty although this was not expressly agreed on at the time of the renewal. And he who claims that this or that article is not included within the general renewal, has against him the presumption which arises from the generality of the words used; and, unless he sustains the burden of proof, he is out of court.

And what if the renewal takes place during the currency of the early 20 treaty, or if a treaty which does not contain any agreement as to time be renewed? This must be construed to be one and the same treaty extended or affirmed by renewal, and the parties to it continue in consequence uninterrupted bound by it. In such a case, that is to say, the aforementioned principle is inoperative because the treaty has never come to an end, so that it may properly be deemed to be one and the same throughout.

Again, treaties are also dissolved by non-use, especially when this is over 21 a long period of time; for the parties then seem, by non-use of their rights under the treaty, to have tacitly withdrawn from its bond. This would especially be the case if they had been in need of each other's help but one party had not, on that score, made any charge against the other of breach of the alliance. Herefrom we may deduce the possibility of a dissolution of an alliance by a contrary intent, or of a tacit dissolution thereof: and to produce this result, there is no need of immemorial time; but directly it is clear about the non-use of the alliance and about the need of help experienced by the parties and their silence, the presumptions from which that contrary intent can be deduced become conclusive, especially if there is in addition the lapse of a considerable, though not necessarily an immemorial, period of time.

Lastly, not every alliance, but only a personal one, is dissolved by the 22 death of the allied members. This is to be construed to apply both to civil death (as where an allied King loses his kingdom) and also to natural death, unless a period has been named for the duration of the alliance so that the personal alliance will go on thereafter in the person of the successor.

What, then, must be said of an alliance contracted between several 23 parties? If one dies, is it dissolved as regards the others? As a rule I should say not, although among private persons the death of one member of a partnership ends it as regards all (*Dig.* 17, 2, 65, 9). But the principle is different with public partnerships, unless the deceased member was one whose services and judgment were the mainstay thereof (by inference from *Dig.* 17, 2, 59); for then the presumption is that the parties did not intend to continue bound in that event. Certainly the death of Pope Adrian VI did not give

any such release to the Venetian Senate and the other confederate members from the bond of the alliance, and the Emperor Charles V exacted from them the agreed-on penalty for non-observance of the articles of the alliance.

24 In real alliances the principle is a very different one. The rule here is that death does not put an end to them. I am speaking of course of natural death. So if, in an aristocratic State, the individual Senators die, or the people in a democratic, or the King in a monarchic, a real alliance of that republic or kingdom does not end, but passes to the successors in office or power. If, however, we speak of destruction of the whole State, as such, as where a republic or kingdom is seized by an enemy by right of war, the opposite view must be maintained; for the former alliances, real though they be, do not bind an enemy, but must be taken to have come to an end with the State itself. This was so when the Romans occupied the kingdom of Syphax and the other Kings: no trace of the obligation of the royal alliances remained with them; nor could there have been any, since these Kings were the allies of the enemy of the Romans.

25 It may accordingly be deduced that when a State, as such, comes to an end, its alliances die with it. Note, however, that I say, "when a State comes to an end"; for not every change in it is enough to produce this result, but only a violent change whereby the State, as such, is subjected to an enemy or to a usurper. Such events as these mean that the State is really at an end; and the like occurs to a city-State when it is ploughed over (by inference from *Dig.* 7, 4, 21), and to a kingdom if it be reduced to a province, as, among other examples, happened to the Kingdom of Macedonia after the defeat of Perseus, as told by Livy (*History*, bk. 45).

26 The rights of the case are different if a republic is changed, with the consent of its citizens, into a kingdom, or if a kingdom is changed, with the consent of the King, into a republic. In such cases a new form of government begins by consent; and so we can put this construction forward, namely, that the real alliance which existed before has passed on, by the same legal transaction, to the supervening form of government, in such a way that the King or People or Senate to whom the sovereign power has been passed on remains bound thereby. An example of this happened of old at Rome after the expulsion of the Kings: the alliances struck during the Kingly period with the peoples of Latium continued thereafter during the free Republic.

27 It is certainly improbab'e that they who have voluntarily shared with others, or passed on to others, the public power that was vested in themselves, intended thereby to subvert the legal relations of the State with outsiders, whereby they had themselves been bound; nay, they had no power to do this,
28 save for cogent reasons permitted by the Law of Nations. This is so unless it clearly appears that the original intention of the contracting parties can not be maintained, owing to the change in the character of the State. Hereon I do not now wish to add anything more, preferring to pass on to the topic of the next chapter, namely, the rights and duties of neutrality (as it is called).

CHAPTER XXVI.

Of the Law of Neutrality.

SUMMARY.

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| 1. Who are neutrals.
2-4. Definition and requisites of neutrality.
5, 6. When neutrality requires the suzerain's consent, and when not.
7. Imperial Abschied of the year 1641, § <i>und demnach</i> , as regards neutrality.
8. Principles on which particular treaties of neutrality depend.
9. Letter of the Estates of Lower Saxony to the Electoral College about a particular neutrality. (See answer thereto in 30 <i>infra</i> .)
10, 11. Absolute and limited neutrality.
12-19. Whether neutrality can be compelled or whether there is a compulsory species of neutrality.
20, 21. Tacit neutrality shown by presumptions.
22. The effects of neutrality may be considered under three heads.
23. What is permissible to neutrals as regards belligerents.
24-26. A bond of friendship with belligerents is of the essence of neutrality. | 27-34. Whether, and how far, commerce between neutrals and belligerents is allowed.
35, 36. Passage may be allowed to one belligerent without breach of neutrality, and the other belligerent may not occupy the places passed through.
37. Whether a treaty of neutrality binds neutrals to allow commerce and passage to a belligerent.
38. No breach of neutrality to forbid commerce and passage absolutely.
39. A neutral is under no obligation to sell to either belligerent things that he needs himself.
40. A neutral not bound to sell victuals and the like to a friend against his own advantage.
41, 42. Whether belligerents may engage in hostilities in neutral territory.
43, 44. How neutrality is ended. |
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I now come to speak of Neutrality. For a State may be neither an ally 1 nor an enemy. Such States were called *medii* in Roman history; we use the word "Neutrals." This middle, or neutral, condition with which we are now concerned is set up by agreement, and does not exist by mere Law apart from agreement; for, although in the more general sense any may be called *medii*, or neutrals, as in the distinction drawn above about the word "peace"—for example, in the recent Germano-Gallic War, the King of Poland, the Grand Duke of Muscovy, and other Princes might in this sense be called neutrals, in that they were not the ally of either belligerent—yet, strictly speaking and in the usage of the Law of Nations, those only are neutrals who derive their middle position from consent or agreement; for that regularizes the position of a *medius*, or neutral, so that he may behave himself friendly to both sides though they are fighting each other.

Neutrality, then, is simply the right of equal friendship with each or all 2 of the belligerent parties, constituted by consent or agreement. Accordingly, (1) it is necessary, as regards the efficient cause of neutrality, that the belligerents on each side must unanimously consent to give this neutrality, as it

is called, to the third power. A belligerent that does not give this consent is not bound to recognize the neutrality but may, if circumstances carry him so far, compel the third power to quit the position of friendship with his enemies, to save himself from hurt in the war. It follows, then, that neutrality must be construed as a strictly personal matter, in such a way that a power may be neutral as regards one ally and not neutral as regards another who refuses his consent to the neutrality.

3 (2) The party thus obtaining neutrality, as it is called, by consent, must be a member of the society governed by Public Law and be capable of making war and treaties, etc.; for it is futile to agree with a party that he may comport himself as an enemy to neither side when he has no power of arms and can not be an enemy to any one. It follows, therefore, that a neutrality granted by the belligerents on either side to private persons or bodies corporate, such as our own University formerly desired for the preservation of its rents, is simply a privilege of safety and not that right of equal friendship towards the belligerents, of which I am speaking here.

4 (3) A formal requisite is the equality of the friendship of the neutral Prince or State towards the foes; that is, he must not adhere to one more or less than to the other. For, immediately this is done, one or the other has a cause of complaint that neutrality is not being observed. The prætor Lucius Æmilius, in Livy, bk. 37, charges the Teians "with having assisted the enemy's fleet with provisions, and with having promised a quantity of wine to Polyxenidas," the admiral of the fleet of Antiochus; and he told them that "if they would furnish the same supplies to the Roman fleet, he would recall his troops from plundering; otherwise he would treat them as enemies."

5 This is undoubtedly so when the neutral Prince or State is not dependent on a superior; but if it be dependent, the superior's consent is needed by the circumstances for an agreement of neutrality. Examples of this were furnished in our own day by the different States of the Empire, and individually by Strassburg and Speyer, which obtained that right with the Emperor's consent. Indeed, there is not only an express provision for this in the Imperial Abschied of the year 1641 (*§ Also setzen*), but it is also quite clear in principle; for he who is bound by public laws, and, maybe, by an oath, to aid one of the belligerent parties, can not against his will get rid of that obligation by an agreement of neutrality. That same Abschied of the year 1641 employs the same argument, in *§ Und demnach*.

6 I see, however, that the matter calls for a little further consideration. For what if the war be not against the Emperor or King or superior State, but between outsiders only? and what if the war be not lawfully declared or be notoriously unjust (in which case the commentators on Feudal Law hold that a vassal is relieved from what they call his *hostenditiae*, or his aid in the war)? and what, further, if the aid due is but limited, and the vassal desires

to send it while remaining *medius* in other respects, neither side objecting? and what if the royal vassals are not defended, and the enemy is threatening the province, and ruin is imminent? In these cases, indeed, I think that by the Law of Nations an agreement of neutrality may be entered into without waiting for the superior's consent; or the above-mentioned principle of the former obligation is inoperative.

And the text of § *Und demnach* is not in the way of this, though it 7 admits no case of necessity as an exception to the rule forbidding neutrality, for it is speaking of Positive Law and not of the Law of Nations. Nay, as regards our Positive Law, to wit, the laws of the Empire about public peace and the defense and administration thereof, that passage seems only to deny to the States a grant of neutrality as and when the needs and danger of the Empire require the denial—“*in allgemeiner Noth und Gefahr des Vaterlands*”—and so, apart from this special circumstance, the opposite proposition seems correct, namely, that an agreement of neutrality is lawful in view of individual needs.

It is to be wished that, in every Empire, the force and efficacy of the 8 public defense were such that individual vassals and tenants in serjeanty could on every occasion secure the safety of their own provinces and estates and jurisdictions against hostile assaults. But as State aid is often over-tardy and unreliable and almost un hoped for, the Law of Nations does not so utterly reject these individual arrangements for peace and neutrality. Let us suppose some individual neighboring Prince or State, which is unequal to the task of defending itself by arms, to be in danger of reduction by the enemy more quickly than public aid can be sent. Will it not be better for it to provide for itself in the meanwhile by a pact of neutrality, so preserving itself for service on other occasions to the Commonwealth or its confederate allies, than for it to be compelled by force to make surrender and swell the power of the enemy? The Estates of Lower Saxony, when in imminent danger from 9 the Swedish army, addressed an apposite remonstrance on this very point to the Electoral College, in a letter dated 22. Febr., 1639, in Lundorp (part 4, bk. 3, my copy, p. 699), couched as follows:

“Bey welcher Bewandnuss wir in hoher Vorsorg begriffen, dass andere Hülff und Rettung uns viel zu spat kommen, und wir ja zumahlen nichts Christlichers, bessers, nützlichers gedencken können, dann dass der Crais *salvo respectu Imperatoris et Imperii* nur in etwas *salviret* und erhalten werden möchte. Ja, wann auch solcher hochnützlicher Zweck auf keine andere weiss, als dass der Crais und dessen Glieder von beiderseits Armeen mit Einquartierung, *exactionen*, und anderer Belästigung übersehen und verschonet werde, zu erhalten wäre, so sind wir dannoch der beständigen Meinung, dass auch solche Mittel nicht ausser Acht zu lassen, damit der Crais Ihr Kaiserl. Majestät und dem Reich in schuldigster *devotion* zum

besten *salviret* werde, und dahero der Kaiserl. Majestät und dem Römisch. Reich ins Künftig die Schuldigkeit gereicht und gegeben werden könne." *

10 This being premised, let us now discuss the two kinds of *medietas*, or neutrality; of these, one is absolute, and the other restricted by definite conventional limits. The former of these kinds treats the parties to the agreement on an absolutely equal footing unless, maybe, one was specially bound to the other by an earlier obligation, as just mentioned. If this be the case, then, although no provision safeguarding such obligation has been added to the pact of neutrality, it must be read into it tacitly; and, in order that it may be treated as waived, there must be a special agreement to that effect. But in the case of vassals and federated allies a further distinction arises, which will be dealt with later.

11 The latter kind of neutrality is regulated partly by its common nature and partly by the pacts that are added, so that anything not settled by these pacts is to be pronounced on by the Law of Nations in accordance with the common nature of neutrality.

12 Further, it must be enquired whether there is such a thing as a compulsory condition of neutrality. This question depends on another, namely, Whether it is permissible to compel any one to be a neutral. In favor of an affirmative answer is what was mentioned a little while ago, namely, that a party may be compelled to quit the state of neutrality; and if so, why may he not be compelled to accept it? That would but be following the well-worn maxim, Anything is unbound in the way in which it was bound. It is, accordingly, relevant here to recall the example already given of the compulsion applied by the prætor Æmilius to the Teians to supply him with as much as they had supplied his enemy with: for what is this but to compel the adoption of neutrality?

13 But in favor of a negative answer we are pressed by the fact that neutrality results from agreement; now, an agreement that is to have any legal effect can not be forced. Moreover, the argument derived from the compulsory abandonment of neutrality is unsound; for, in accordance with what has been said, this applies only in regard of dissentients, and in this case it is not to be wondered at that by the Law of Nations the obligation of neutrality does not bind parties who do not consent thereto. Nay, if circumstances demand it, others may compel them to declare themselves either as enemies or as allies; and the speech of the prætor Aristænus in the Council of the Achæans (*Livy, History*, bk. 32) was to that effect, he saying: "Cleomedon

* "In this plight, we are seized with deep anxiety lest other help and rescue comes to us much too late. And before all, we can propose nothing more Christian, better, and more useful than that this Circle, with all respect to the Emperor and Empire, in some degree only be saved and preserved. Aye, if that most expedient object can be attained in no other way than by overlooking and exempting this Circle and its members from the quarterings and exactions and other burdens imposed by the armies of both sides, we are nevertheless of the steadfast opinion that even such measures should not be neglected, so that the Circle may be preserved as well as is possible, in most dutious devotion to Your Imperial Majesty and the Empire, and that our obligations therefor may in the future be extended and proffered to Your Imperial Majesty and the Roman Empire."

has just pointed out, as the middle and safest way, to remain inactive and abstain from taking up arms. But that is not a middle way; it is no way at all. For, besides the necessity of either embracing or rejecting the Roman alliance, what other consequence can ensue from such conduct than that, while showing no steady attachment to either side (as if we were waiting on the event with design to adapt our counsels to fortune), we become the prey of the conqueror?" And so he adds afterwards, "If you (Achæans) reject such persons (Romans) as allies, you can scarcely be of sane mind; for you have to deal with them either as enemies or as allies."

So also, when the war with Antiochus was under discussion Titus 15 Quintius, in Livy (*History*, bk. 37), denounces the middle way to the ambassadors of the Achæans, as being profitless and incompatible with their situation, for it neither makes friends nor gets rid of enemies. These considerations are, however, persuasory and political; and we said above that they should not be mixed up with questions of the Law of Nations.

As regards the matter before us, then, I hold that circumstances must 16 determine whether it is permissible to compel or extort by force the consent to remain neutral. In fact, if no step one way or the other has yet been taken, I think a negative answer is the most correct, for the reason mentioned, namely, that consent ought not to be forced in pacts and stipulations. If, however, some definite step has been taken—perhaps the party has supplied the enemy with money or provisions, or the like, as the Teians are said to have done in the case of the *prætor* Æmilius—either they ought by rights, other things being equal, to supply the other side to the same amount, or it ought to be possible to compel them to neutrality, as having committed an act of hostility. For, under the Law of Nations, we must qualify the rule that no 17 one can be forced to make an agreement, by adding "unless he has committed an act of hostility." If he has, there is no doubt at all; for, when the victor in war compels a pacification or a surrender, pacts and stipulations of that kind between Kings and peoples are valid by a presumption of consent contained in the preceding unlawful act. Why, then, should not pacts of neutrality be valid in these circumstances, which are supposed to be the circumstances of the case before us?

Now, I added the words "other things being equal"; my reason was, that if it was under compulsion, and not of their free will, that the *medii* supplied anything of use in war to the other belligerent, there is no ground for treating it as a hostile act, and therefore none for employing the compulsion mentioned. And this is what, in the last century, the townsfolk of Cambrai 18 answered to the King of France when he asked them to receive his troops as they had received the Imperial troops before: "they were not free to receive French troops, no longer being their own masters, owing to the fortress which the Emperor had placed on their necks." (See de Thou, bk. 12.)

All this shows that there is no compulsory kind of neutrality, unless some 19 antecedent event has justified the use of compulsion, as happens when the

party who is under compulsion has done something which entitles the other party to consider him as an enemy.

- 20 That there can be a tacit neutrality is as well admitted and as certain as that there can be a tacit pact (*Dig.* 2, 14: 2 and 57). And just as it is indifferent in Law-making whether the people shows its will by a vote or by circumstances and conduct, as Julian says (*Dig.* 1, 3, 32, 1), so it is also indifferent in other public agreements. Any one can show consent either by conduct or by an express declaration of intent, provided the conduct be of such a kind that consent may be properly deduced from it. Let us keep to the case of Æmilius. Who, I ask, will deny that neutrality, or the rights and duties of a middle position, were conceded to the Teians by the very fact that their hostile acts were condoned by the Romans in a pact, which pact provided that they should supply the Romans to the same extent as they had previously supplied the navy of Antiochus? For by an agreement of this kind they neither became allies of the Romans, seeing that they were not rendered incapable of aiding the enemy afresh, nor were they again left as enemies, the terms of the agreement preventing this. They therefore were *medii*, or neutrals; and that is extremely well expressed by reference to the formal principle of neutrality, namely, an equal friendship for the enemies on both sides. Hence, although no pact was concluded for the cessation of hostilities, it was tacitly understood that neutrality was agreed on through the practice of an equal friendship, the enemies on each side knowing about it and not making any opposition to it. For he who allows a friendship to be carried on both with himself and with his enemy, as shown by the supply of provisions and money and material of war, and makes no opposition thereto, is of course taken to have agreed that the mutual friend should be of the middle position and should not be taken to be either enemy or ally.

So far about the persons who agree to a neutrality, and the different varieties and forms of neutrality.

- 22 Our next topic is the effects of neutrality. This can be looked at in three ways: (1) The effect on the neutral as regards the belligerents, (2) The effect on the belligerents as regards the neutral, (3) The effect on each belligerent as regards the other on neutral territory. Touching the first two of these, it is certain, from what has preceded, that in general the obligation of neutrality consists in abstention from hostile acts towards either belligerent; this involves the bond of friendship, at any rate in the negative sense of not behaving in a hostile way towards those with whom we have made an agreement of neutrality.

- 23 A neutral, then, may not kill the soldiers of either belligerent, nor storm their fortresses or cities or castles, nor lay waste their territories, nor capture their men, nor plunder their property, and so forth. And the belligerents are undoubtedly under a reciprocal obligation towards the neutral. This, I think, is of the essence of the Law of Neutrality—speaking, of course, of the absolute or unrestricted kind. And if any modification has been made by an ante-

cedent agreement or oath, this must be taken as an exception only, and in other respects the general rule must be followed, so that not even a condition restrictive of neutrality can justify neutrals in offensive acts of hostility against belligerents, and *vice versa*.

But, it may be objected, if it is permissible to vary the general rule by 24 contract, the resulting obligation is rather of natural origin than an essential part of the Law of Neutrality; for it is a well-known refinement of jurists to style those incidents of a legal institute "natural" which are as a rule present, but which may be dispensed with by a contrary agreement—like the rule about eviction in sale, or moratory interest in *bonæ fidei* contracts, and other things of that kind—while those only are of the substance of the transaction which can not be excluded by any contrary agreement. (See, for examples, *Dig.* 2, 14, 27 (3 and 4); 16, 3, 1, 45 (?); 43, 26, 12, pr.)

My answer is, that some things which have a hostile savor may be 25 allowed by special agreement, but not everything of a kindred character; for that can not be considered a kind of neutrality where the *medii* may indulge promiscuously in hostile acts against the belligerents, or *vice versa*. For 26 example, although a neutral vassal may without breach of neutrality send *hostenditiae* to his suzerain, that must not be taken to put him in a position to use all kinds of offense against his lord's enemy; for the assent of the lord to the agreement of neutrality carries with it a certain remission of feudal obligations, so that the vassal is not bound according to the strict tenor of his oath of fealty to aid his lord with all his strength. This is the nature of the obligation, consisting in negative duties of abstention from offensive operations, which holds reciprocally between neutrals and belligerents in virtue of the oath of neutrality.

The question of the positive effects of neutrality calls for more 27 consideration. Here, however, it is very necessary to separate what may be done from what, because of the bond of some agreement, assumes the character of a duty.

First we will speak of commerce, whether and how far it is one of the things permitted between neutrals and belligerents. I do not hesitate to declare that this commerce is as a rule permitted, in those commodities, of course, which do not directly affect the war. It would be absurd for parties to be put by agreement in a condition of friendship one with the other, and yet for commerce between them to be forbidden, so that, simply for the sake of bringing a little more advantage to the other party, they are unable to contract one with the other.

But if we are speaking of articles of warlike use, like weapons, the solution of the question is harder. To supply an enemy with necessities of war has a hostile appearance, as Amalasuintha says to Justinian in Procopius (*De bello Gothicō*, bk. 1); and Queen Elizabeth of England was also of his way of thinking, when, according to de Thou (bk. 96), she made reply to the complaint of the Hanse towns about the plundering of their ships, they acting

as enemies of England although allowed by agreement to retain their friendship, "To inflict hurt on one side and aid the other is not to keep friends with both, but it is to reinforce the enemy and to join them against the other."

29 All the same, I think that a neutral may trade with a belligerent even in arms and provisions, and the like, provided (1) That the neutral does not himself use the arms against the other belligerent (this would be an act of hostility), and (2) That the neutral treats both sides alike. The solid basis of this assertion can be found in the law of common friendship, which must be construed as taking away from the neutral, not the right to trade, but the use and comradeship of arms, especially as each side has only himself to thank if, through his grant of neutral rights, he sustains any hurt from that equal commercial intercourse. That, undoubtedly, is what was in the contemplation of the August Electoral College when, in reply to the Estates of Lower Saxony, it adduced, among others, this reason against the grant of neutrality: "dass der Cron Schweden aller Vorthel in deme zuwachse, dass dieselbe sich auss der Neutralität gemachten örtern nicht allein keine Hinder-nuss und also keiner gesambten *conjunction* mehr würden zu befahren, sonderen anderer *commodität* zugeschweigen zum wenigsten durch Werbung und Verkauffung Proviants, Munitions-, und anderer Kriegs-bereitschaften allerhand *avantage* zu erfreuen haben."* (Lundorp, place named.) So, also, in the recent war, when, as pretty often happened, the Imperial and French forces were encamped in the neighborhood of Strassburg, which was then neutral, both sides were free to buy necessities of war there without any breach of neutrality.

31 And here I do not employ the distinction drawn by some celebrated writers, who think that it makes a difference whether that kind of trade is conducted on public or on private account. For neither on public nor on private account may neutrals indulge in hostilities, and so the gist of the question is about hostilities. If the transaction under consideration is admittedly hostile to the other belligerent, it can not be allowed either on public or on private account; otherwise it is lawful on either account without breach of neutrality.

32 To the examples which have been adduced to the contrary, it can be replied that they do not so much affect the Law of Neutrality as illustrate an inequality in trading or contractual relations with one belligerent, by which 33 the other is damned. Nay, if the neutral is impartial in rendering these services, or at any rate if he is not responsible for one belligerent employing them more than the other, the belligerents are entitled, as against each other, to intercept on their way to the enemy the goods which the neutral, in pursuance of a contract, is sending there on public or private account. This comes from that rule of equity that, just as trade with each side is allowed to neutrals, so, conversely, the side injured by that trade is allowed by the same law

* "That all the profit would accrue to the Crown of Sweden, if it not only had no more hindrance to meet with in the neutralized places, and therefore no concerted joinder of forces, but also, not to mention other gains, could enjoy all kinds of advantage through recruiting and purchase of food and arms and other provisions for war."

to ward off the injury. And I do not doubt that it would be approved by the Law of Nations, also, if the other side intercepted arms, foodstuffs, and things of similar use in war, although sent from neutral territory, in reliance on the sound argument that neutral territory is not privileged in this matter more than the territory of any other third power. Accordingly, just as the dictates 34 of reason and the Law of Nations concur in allowing a belligerent to seize goods which, to his hurt, have been consigned to his enemy from any such third territory, according to Grotius (*De jure belli ac pacis*, bk. 3, § 5), so the same holds with regard to such a consignment from a neutral territory. In that way I should justify Queen Elizabeth's answer, given above, as long as nothing was taken from the Hanseatic ships except articles of use in war.

With regard to the passage of troops of one belligerent over neutral 35 territory, the same question arises and the Law is the same, namely, that such passage may be granted without a breach of neutrality. But here a notable diversity arises, for the belligerent who conceives himself injured by such grant of passage is not at liberty, without a breach of neutral rights, to occupy the territory by force and arms in order to prevent the passage, or on any other pretext of warlike advantage. Least of all may the belligerent occupy this territory if the public safety of the neutral be affected thereby. This contrasts with what I said about the seizure of goods consigned to the enemy.

The reason of this diversity is, of course, easy to see. Goods consigned 36 to the enemy are not intended by the consignor to remain in the dominion and possession of the neutral King or Prince or State, or their individual citizens; and so they can with propriety be intercepted, as being goods which actually are or soon will become, to the injury of the captor, the property of his enemy. But the seizure of property that remains within the control and protection of the neutral King or Prince or State, and which is not about to pass into the ownership of the other belligerent, is a hostile act and therefore not permissible, but contrary to neutral rights.

This is what I have to say about permissible trade and passage over neutral 37 territory; but the question of compulsion of either neutral or belligerent in these matters is a different one. Here the rule must be laid down, that neutrals are bound to belligerents, as regards commerce or no-commerce and as regards passage, only in the same way that they are bound to other friendly nations. For the direct operation of a pact of neutrality is simply this, that the neutral holds aloof from the war, but not that he binds himself by a special obligation with regard to trade or foodstuffs. Accordingly, every bond in this matter must be referred to the standard of the law of common friendship, of Nature's institution. And just as I am under a duty to serve my friend, in the sense of Seneca, where (*De beneficiis*) he treats of the laws of friendship, so a *medius*, or neutral, should serve those who are entitled at his hands to the same rights of friendship.

Two points worth making can be gathered from the above: (1) When 38 a neutral Prince or State does not supply a neutral friend with arms, food-

stuffs, and other equipment of war, he (or it) does not in strictness go counter to the rights of the agreement, but, at most, counter to the laws of humanity; consequently, if a clause providing for a penalty in case of breach has been inserted in the pact, the penalty can not be claimed, nor is a pretext afforded for a rupture of neutrality.

39 (2) If the neutral be himself in need of arms, foodstuffs, and similar outfit, he is not bound to supply them to a neutral friend either under the agreement or under the law of common friendship: not under the agreement, because, as has been said, the force of the agreement does not extend so far; and not under the law of friendship, because charity begins at home. There is no precept of Nature that men should help their friends even at the cost of depriving themselves of necessities; hence, in self-defense, a topic dealt with above, we are allowed, if it can not be otherwise effected, to kill even an innocent friend. The contrary instance of Pylades and Orestes, each of whom preferred his own death to that of his friend, was due to a unique affection rather than to any Law of Nature; and it certainly is not in point in connection with the public friendship of neutral Kings and peoples.

40 What, then, if it be not a case of need, but would involve the loss of some advantage to the neutral Prince or State? Is the friend to be gratified then, and the advantage to be foregone at the bidding of the law of friendship? Assume, for example, that corn or wine, or the like, is daily becoming dearer. What is required; ought the commodities in question to be sold to a neutral friend at the current price of the day, or not? I am not thinking of the obligation of the agreement, but of probity; and from this point of view it seems just, if the wares would not otherwise be offered for sale, to pay the higher price rather than that the neutral owners should be compelled to sell at the lower price, for commercial dealings ought to be free.

41 A further question remains, concerning the belligerents: What is permitted to each of them on neutral territory, and, particularly, can they engage in hostilities against each other there? The answer seems to be, Yes, but with a distinction. Either there is or there is not a probability that the neutral will be injured thereby. In the former contingency the exercise of hostilities is not allowed—not in the interests of the belligerents, but in the interests of the neutrals, who would be injured in despite of the agreement. In the latter contingency it is otherwise; for the neutral quality of the place, apart from any chance of injury being done, does not deprive the belligerents of their use of arms.

42 We see, then, that it is obviously unlawful to attack or capture or kill an enemy in a neutral city, because of the easy opportunity it would offer for riot, and for injury to buildings and inhabitants; but the opposite holds of such neutral territory as is only used for military training and sham fights.

43 Some words now about the termination of neutrality. Beyond doubt neutrality can be ended by common consent, the natural mode of unbinding anything being the mode in which it was bound. Next, it can be ended by a

one-sided renunciation, as I said above about treaties. Here it is probable that a just cause must intervene, where, that is, it was agreed that the neutrality should continue up to the end of the war; for if no stipulation about time was made initially, renunciation will be entirely within the discretion of the parties. If, however, the agreement named a time up to which it was to last, a cause must be assigned if it be broken off during that period; and at the expiry of the period it will automatically end, unless the time has been extended.

Now, a change in the aspect of circumstances will be a just cause; for 44 certainly, in these public agreements, policy must often be shaped by circumstances, and it is improper to construe a previous consent in such a way that it turns to the ruin or serious hurt of one or other party despite his presumed intent. And an especially just cause of renunciation of neutrality will be its violation by the other side. This of itself destroys the obligation, so that the will of the injured part to withdraw from the state of neutrality is enough; and this will may be signified either by words or by deeds. Clearly, when there is even one dissentient party only, the agreement by its own nature must become defective and the neutrals remain such no longer, but become the allies of one side and the enemies of the other.

Let these remarks suffice on the subject of the present chapter.

CHAPTER XXVII.

Of Oaths.

SUMMARY.

1. Oaths are taken alike in connection with public and with private agreements.
 2. Definition of an oath.
 3. Examples given of oaths on creatures.
 4, 8. Such oaths as these either are not true oaths or contain an implied invocation of God.
 5-7. A creature can, as regards oaths, be considered in four ways, according to Lessius.
 9, 10. The difference between execration and attestation in oaths.
 11. The imprecation "Devil take you" is not strictly an oath.
 12. Whether attestation on one's soul has the nature of an oath.
 13, 22. Whether an oath on false gods is a genuine oath.
 14, 15. The text of St. Augustine's *Sermon 28*, on the words of the Apostle, is variously given by Gratian and Covarruvias.
 16. Perjury on false gods depends on the intent of the swearer, and not on the actual facts.
 17, 18. A passage from St. Augustine's *Letter to Publicola*.
 19-21. An oath on false gods does not of itself bind as an oath, but through the mistaken state of mind of the swearer.
 23. An oath of an atheist on the true God is a genuine oath, although the swearer does not believe in Him.
 24. An oath and the correspondent perjury can be interpreted in three ways: according to the fact and the belief of the swearer; according to his belief, but not according to the fact; according to the fact, but not according to his belief.
 25-30. Which is the greater sin, to swear falsely on the true God or truly on false gods?
 31-35. The essential parts of an oath.
 36. To swear on God or on His attributes comes to the same thing.
 37, 38. Whether it is lawful to swear by God's limbs.
 39. An oath on Christ's wounds is a true oath; how it is to be understood.
 40. Oaths taken by Turks and other infidels on the Supreme Name are true oaths.
 41. Stipulations entered into instead of an oath are not to be reckoned true oaths.
 42. The same of other undertakings on simple good-faith, even although taken by people of dignified rank.
 43. The three concomitants of an oath: truth, justice, and judgment.
44. To take an oath is permitted for just cause.
 45. The passage in St. Matthew, ch. 5, no obstacle; how it is to be interpreted.
 46. How an assertory or a promissory oath is performed.
 47, 48. The homage of subjects binds them like any other promissory oath.
 49. A promissory oath may be offered with greater or less safety, according to the circumstances.
 50. The oath of a vassal or subject, or of a King towards his people is valid.
 51, 52. Oaths not to be proffered save concerning things that are within our power.
 53, 55. What precautions ensure that a promissory oath is properly taken.
 54. The swearer of a promissory oath who is prevented from performance not liable on the ground of fraud or negligence.
 56. Both promissory and assertory oaths are lawful at the present day.
 57. An oath to do something unlawful is null.
 58, 59. *Boni mores* may be regarded from the standpoint of either Positive Law, or the Law of Nature, or the Law of Nations.
 60. An oath ought to relate only to things that are possible.
 61-66. Whether, and to what extent, those are liable who swear to do what is wrong or impossible.
 67, 68. An assertory oath with regard to things that are impossible in nature is not well taken; but otherwise of an oath with regard to wrong acts.
 69. Difference between an assertory and a promissory oath.
 70. By the Law of Nations a confirmatory oath can, according to the circumstances, be included under either an assertory or a promissory oath.
 71. Principles on which an oath is to be interpreted.
 72. Oaths must be literally performed.
 73, 74. The effect of an oath in an obligation.
 75, 76. Whether one who takes an oath to pay can resort to a set-off.
 77, 78. An oath assumes the nature of the act to which it is adjoined.
 79. An oath implies the condition, "things remaining in the same condition."
 80. A vow is not valid to the prejudice of the children of him who makes it.
 81, 82. Whether an oath confirms what is forbidden or unlawful.
 83. An oath an essentially personal thing.
 84. Fraud, force, duress, error are alien to oaths.

Not only public treaties and truces and agreements, but also the contracts 1 and undertakings of private persons, are often confirmed by the most sacred legal bond of all, namely, an invocation of God to be witness to our acts and undertakings and promises. This institute, then, is one of those which come from our duty to God; at any rate it presupposes that duty, for he who does not believe in a God Who has a care for human things, will lightly forswear himself and reck not at all of the God Who is offended by his broken oath. Hence the Romans, so Livy tells us, said to the Carthaginians who were suing for peace, that Romans believed in God and in oaths; they recognized, that is, the intimate connection between belief in God and respect for oaths, as mentioned in its proper place.

This being so, it is not hard to define an oath in general. It is simply a 2 pious taking of the Deity as a witness and assurance of good-faith, "*Als wahr Gott uns helft, als wahr Gott lebt,*" etc. And so it must be denied: (1) That a genuine oath can be taken on creatures, as such; and (2) That oaths on false gods are genuine oaths, although they bind the swearer who believes they are true gods because of his mistaken state of mind.

Now, as regards oaths on creatures, instances hereof occur here and 3 there, both in sacred and in profane history and even in our Civil Law. Thus, Joseph is said to have sworn on the life of Pharaoh (*Genesis*, ch. 42, v. 13), Abner by the soul of Saul (*1 Samuel*, ch. 15), Elisha by the life of Elijah (*2 Kings*, ch. 12, v. 2). So Briseis swears to Achilles, in *Epistola heroidum*, by the souls of her brothers. And in Ulpian (*Dig.* 12, 2, 11, 3) an oath is taken on the genius of the Emperor.

But either those and similar oaths are not properly oaths, or else they 4 contain an implied invocation of the Deity and a reference to Him in the mind of the swearer. In this connection we have the distinction drawn by Lessius, *De justitia et jure*, bk. 2, ch. 42, dub. 2, n. 10, where he shows that creatures can, as regards oaths, be considered in four ways: (1) In and by 5 themselves—and in this sense Lessius denies that oaths on creatures are genuine oaths, because creatures either do not understand the testimony to which they are vouched or do not understand it in the form of supreme truth. (2) To the extent that the Deity is manifest or apprehended in the creature—of this kind are oaths by heaven, by earth; and with these Christ deals in *St. Matthew*, chs. 5 and 32. This oath is understood as taken on the Deity on Whom heaven and earth depend, that is, on God the infinitely Good and Great; and in this class oaths on temples, on the royal city, and on any other such-like thing are rightly placed, for they are interpreted as taken on God, Who is worshiped in those places, or Who is the Guardian of the temple or the city. (3) The creature on which we swear may be something pertaining 6 to ourselves which we bind to God as a pledge of the truth of what we are asserting: as, for instance, if any one swears on his soul, or on the life of the King or Prince, on which the life of the swearer depends—and in this sense Joseph's oath on the life of Pharaoh may be interpreted. (4) Here we 7

attribute in our belief something of Divinity to the creature. In this class of oath there is a kind of blasphemy, as Lessius rightly says (place named).

8 This classification shows the truth of my previous assertion, that an oath taken on a creature in and by itself is not a genuine oath; for this is the case in the first and fourth kind given by Lessius, while in the others, to wit, the second and third, the Deity is impliedly included.

9 For a fuller exposition of this matter I must not omit to note that the doctors, speaking of oaths, distinguish an execration from a juratory attestation. An execration is accomplished by an imprecation whereby the swearer binds and devotes himself. It was much in use by the ancients. Thus, Hannibal, on the eve of his first encounter with the Romans, made certain promises to his soldiery; and then, in Livy's words (bk. 21), "he prayed to Jupiter and the other gods that, if he was false to his word, they would thus slay him as he slew this lamb." Another formula is that employed by Scipio Africanus: at the time when the affairs of Rome were in so desperate a case after the battle of Cannæ, he bound the notables who were contemplating flight by the following words: "With sincerity of soul I swear that neither will I myself desert the cause of the Roman republic, nor will I suffer any other citizen of Rome to desert it. If knowingly I violate this oath, then, O Jupiter supremely great and good, mayest thou visit my house, my family, and my fortune with perdition the most horrible." (Livy, *History*, bk. 22.) Not only was such execration used in olden time, but to-day also men at times add it to their oaths, imprecating on themselves, if they do not swear truly, this or that calamity, such as decease or death. But the juratory attestation is accomplished by an invocation of the Deity as a witness, without any imprecation.

10 Further, a clear distinction must be drawn between, on the one hand, an execration or a juratory attestation and, on the other, an absolute imprecation without any form of a genuine oath. For not every execration is an oath; I not every attestation adds weight to the business in hand: thus, for example, an ejaculation that if we are not speaking the truth "may the Devil take us" is an imprecation; but it is not an oath, because we do not invoke God as a witness. But if any one imagines that even here he is taking an oath, and that the Deity is at least implicitly referred to—in such a way as that, by cursing himself if he breaks faith, he puts himself outside Divine protection and, as it were, begs God to allow the fulfilment of the curse to be effected by the Devil—my answer is, that not everything which may be alleged to be present by means of implications and of interpretations perhaps quite remote from the intent of the swearer, is to be introduced so as to satisfy the requisites of an 12 oath; and, to speak truth, even an attestation on one's soul, "*da einer bey seiner Seele etwas bezeuget*," or by the soul of another (as in the case of Abner, and of Elisha), is not a genuine oath by itself, but only when other words are present of a juratory character or expressive of juratory intent (as in Elisha's adjuration when Elijah was on the point of departure, "*So wahr der Herz lebt und deine Seele, Ich lasse dich nicht*").

Another deduction from the definition given of an oath is, That an oath ¹³ on false gods is not a true oath, although it may bind the swearer by reason of his erroneous state of mind.

This may be illustrated by a passage from St. Augustine's *Sermon 28*, ¹⁴ on the words of the Apostle, which Gratian refers to in c. 10, C. 22, qu. 5, but which Covarruvias (*Selectiones* on c. *quamvis pactum*, § 1, n. 21), following an emended text, gives in slightly different form as follows:

"Lo, now, I put it to your charity, that he who swears falsely by a stone is also forsworn. And why? Because many err herein and reckon that, since that is naught whereon they have sworn, they are not guilty of perjury. Thou art, however, undoubtedly forsworn if thou swearest falsely by that which thou thinkest holy (Gratian's text here says 'not holy'). I do not think the stone holy, but I do think Him holy to Whom thou swearest; for when thou swearest, thou swearest not to thyself or to the stone, but to the man before the stone—and is he not before God, too? The stone does not hear what thou sayest, but God punishes thee if thou breakest faith."

I will not enter here on any discussion as to which of the two is the better ¹⁵ text of St. Augustine. Still, in favor of Gratian one might set up St. Augustine's contention that an oath taken on false gods, such as that of the Romans on a stone, which was added by way of imprecation if any one should break faith with Jupiter, ought to be observed. This would admirably suit the context, for there were some who thought that an oath on a stone, and such-like thing which has no sacred contents, might properly be disregarded; now, Augustine (passage cited) tells them that the force of an oath must be measured not so much by reference to the swearer as by reference to the person to whom it is sworn. Moreover, we do not then need to refer both to the stone's being thought holy and to its not being thought holy, as Covarruvias' text does.

However that may be, they agree in the main matter: That an oath ¹⁶ taken on false gods is not really an oath, but is one only in the contemplation of the swearer. And so perjury in that case depends not on the facts but on the swearer's belief. For moral wickedness is present only so far as belief that the god is the true one, together with a violation of the faith plighted on false gods, affects the conscience of the swearer; so that the true God may punish the violation not of a genuine oath, but of one deemed to be such by the swearer, and not kept despite the calls of the mistaken conscience.

It is in that sense that another passage in St. Augustine, in *Letter to 17 Publicola*, 154, must be interpreted; it is given by Gratian, with a few verbal alterations, in c. 16, C. 22, qu. 1, where he says:

" You are concerned to know whether to utilize the good-faith of one who has sworn by demons that he will keep his word. Now, here I would have you first consider whether you do not think that one who has sworn by false gods that he will keep faith, and then has broken it, has committed two sins. For if he has kept faith which he had plighted with such an oath, that

18 would alone be counted a sin, in that he has sworn by such gods; yet no one would blame him therefor, because he has kept faith. But where a man has sworn by those that he ought not to swear by, and has done what he ought not to do in breach of his plighted faith, he of course sins twice. He, therefore, who utilizes the performance of his promise, admittedly sworn on false gods, but does so not for a bad purpose but for a lawful and good purpose, does not associate himself with his sin in swearing by demons."

Thus St. Augustine.

19 This shows once more that an oath on false gods was thought by St. Augustine to be really binding as an oath if the swearer thinks the gods by whom he swears are true gods; for this and the views of the doctors hereon, see Covarruvias (place named). But we have, of course, to distinguish between the bond which an oath has of its own force and that which it derives from the mistaken conscience of the taker. The two are very different. Let us assume that the swearer, at the time of taking the oath, thought the false god was the true one, and that subsequently he has been taught better and has 20 put away his mistaken state of mind. If now he contravenes his oath on the false god, what he violates is only his simple word. For the oath never was one really in the nature of the case, but was one only in the belief of the swearer; and he has now learnt his mistake about the false god and is no longer bound by a mistaken conscience to perform the requirements of an oath, but only those of a contract or simple pact.

21 It follows, then, as I have already said, that in this case a contravention does not involve perjury properly so called: and, granted that he who swears on false gods and then breaks his oath sins twice—that is, according to St. Augustine, both in wrongly swearing and in breaking what he has sworn to—yet the sin does not come under perjury, in the circumstances, for the oath was not in reality on God; but, inasmuch as the swearer believed that he was swearing by the true God, the wickedness of the erroneous belief persists, as regards the true God, so long as he retains that belief, and in regard thereof the swearer is just as open to a charge of perjury if he fail to keep the oath sworn on a false god whom he believed the true one.

22 And so, if any believer or Christian swears by false gods whom he knows to be false, and does not keep his faith, then, although he sins twice over and most grievously, yet he does not commit perjury, as Covarruvias well shows (place named, n. 24).

23 Conversely, if any pagan or atheist swears by the true God, but without belief in Him, that oath is undoubtedly a genuine oath and binds the swearer, and may warrant a charge of perjury. But this bond is clearly not to be derived from the impious error of the swearer, but from the circumstances of the case; for a mistaken conscience has no power or capacity to furnish the erring person with an excuse for remediable and crass ignorance, although, as said above, it may bind him. That ignorance of the true God is remediable and inexcusable appears clearly, in accordance with St. Paul's *Epistle to the*

Romans (ch. 2), from what I have said above under the heading of Religion and Natural Theology.

It follows then, that three kinds of oaths may be distinguished: (1) 24
The oath which is one both in fact and in intention, as when any one swears by the true God, Whom he knows or believes to exist; (2) The oath which is one in intention but not in fact, as when any one swears by a false god whom he believes to be a true god; (3) The oath which is one in fact but not in intention, an example of which we gave in an atheist or unbeliever who swears by the true God in Whom he does not believe.

And there will be as many corresponding varieties of perjury. Herein 25
attention must be paid to what St. Augustine writes in the aforementioned *Letter to Publicola*, and to Gratian's extract from it in c. 16, C. 22, qu. 1, namely, that it is a smaller offense to swear truly by a false god than falsely by the true God.

Domingo Soto, however, maintains the opposite in his treatise *De 26
cavendo juramentorum abusu* (part 1, ch. 6); and Covarruvias follows him (place named, n. 25), holding that "as an oath taken on false gods" (the words are Covarruvias') "savors of idolatry, and such swearing is the offense of idoltry, it is a transgression of the first * commandment of the Decalogue; and this is more heinous than a transgression of the second * commandment, about the violation of an oath, because a greater and more grievous wrong is done to God by denying that He is the one and only God than by taking His name in vain, for the former is an offense against the essential nature of God Himself." So Covarruvias.

Now, although this is sound if we are speaking of these sins in themselves, yet I think it does not hold if we are speaking of the correspondent perjury. Here, undoubtedly, he who breaks a promise to which he has sworn on the true God offends more gravely than he who violates an oath taken on false gods; for the former directly contemns the Deity Whom he has called to witness, while the latter does so only by implication and in a qualified manner—namely, so far as his violation of good-faith may, by reason of his mistaken conscience, be consequentially attracted to the true God, as was shown earlier.

You urge that there is greater respect for religion shown by a man who 28
(to use the words of St. Augustine) swears truly on false gods than by one who swears falsely on the true God. My answer is, that this respect is more nominal than real, being paid to an idol and so involving a manifest idolatry. And he who so swears does not do as well by swearing truly as he does badly by swearing on false gods. In a promissory oath, indeed, I should be inclined to admit St. Augustine's doctrine, that is, as regards the performance and not the taking of the oath; for he who has sworn by false gods is bound, under the 29
dictates of Right Reason, to perform the contract or agreement, not because

* The "first commandment" of the text is the first and second in ordinary English reckoning; the "second commandment" of the text is our third.—TR.

of the gods whom he has invoked but because of the commandment of the true God to perform promises, which commandment is revealed by the light of Right Reason. If, therefore, he performs the agreement in its general tenor, although with the faulty circumstance of a wrongly taken oath, he does not sin so badly as he who knowingly makes default in the good-faith to which he has sworn on the true God; for the latter acts contrary to the Divine command in violating his promises, while the former, by performing and fulfilling these, complies with the command despite the attendant blemish of the impiously taken oath.

30 In a word: he who confirms any undertaking with an oath on false gods sins in the oath but not in carrying out the undertaking, and that oath is a graver sin, on the reasoning of Soto and Covarruvias, than perjury committed against the true God, although that perjury would be a graver sin than the perjury of one who swore on false gods; for, although the oath-breaker believes himself under an obligation to perform his undertaking because of his false conception as to the bindingness of his oath, yet this circumstance of a mistaken conscience can not render the act of breach as intrinsically bad as is perjury committed against the true God. But enough of this.

31 It is apparent that the essential form of an oath consists in that pious taking of the Deity to be witness of the truth. Further details still may now be considered: (1) An asseveration whereby we affirm that God knows or sees something, without our intending an oath, is not an oath. Lessius deduces this (place named, dub. I, n. 4, at *in istis*) from Cajetan and Soto. But, since the intent to take an oath is not always expressed in a definite form of words, we must try to throw more light on the subject.

32 He, then, who employs words by which the testimony of the Deity is invoked, is deemed to have the intent to take an oath, nay, actually to take one. But he who adds words of a merely declaratory character neither takes an oath thereby nor expresses an intent to take an oath. And just as in litigation the production of a witness outweighs a simple affirmation that so-and-so has knowledge of the facts, seeing that even a party who does not desire an examination of the witness can do the latter, so where, in the absence of human testimony, recourse is had to Divine testimony, the act of calling God to witness must be distinguished from a simple asseveration; for the former is itself an oath, but the latter is nothing of the kind.

33 Further, one who swears applies to his assertion or promise the supreme truth of the existence of a Deity or Divine coadjutor, and so makes his assertion or promise with all the certitude of the Deity; hence, if he prove forsworn, he must needs be false not only to his fellow-man to whom he has sworn, but also to God, by Whom he has sworn, seeing that His Divine being

34 and majesty are contemned among men by that false profanation. This explains my statement that the religious taking of the Deity to be witness of the truth is the essential form of an oath, because God is taken to be a witness in no other way than religiously; that is, in such a way that the swearing binds

his good-faith by the first principles of religion, which teach us that God is and that He ought to be worshiped; and if he then breaks faith, he necessarily sins against the first principles of religion.

Hence Grotius well says (*De jure belli ac pacis*, bk. 2, ch. 13, § 10) 35 that an oath ought to carry the meaning that God is invoked in some such way as the following: "Let God be my Witness, or Let God be my Judge; for these two come to the same thing when He Who has the power of punishment is called as Witness: He is also called on at the same time to take vengeance on perfidy; and He Who knows everything is therefore the Avenger, because He is the Witness." So Grotius. Hence an execratory oath, as it is called, differs from an assertory oath, only as an express does from a tacit oath; and the difference is not one of kind, as Lessius correctly shows (place named, dub. 2, n. 9).

It must be noted (2) That it is the same thing whether a man swear by 36 God or by His existence or unity or omnipotence or eternity, etc., because all the other Divine attributes are God Himself in essence, and there is no difference between them except from our imperfect mode of apprehension. Accordingly, we swear correctly if we swear by God's knowledge, "*als wahr Gott allwissend sei oder die Sache wisse*," a formula which, as is apparent from what has been said, is sufficiently distinct from a simple assertion of the Divine knowledge.

Next, (3) An oath can not properly be taken on God's members, as 37 head or ears, both because God has no members—for when members like eyes and ears and hands are attributed to Himself, this must not be literally interpreted, but only as for human reception—and because there is emphatically indecency in the thought that the Deity consists in substance with members, and so oaths of that kind are a form of blasphemy, as we read was enacted by Justinian in *Nov. 77*. It is, then, clear that any peoples or men who use or misuse the oath in this way, are conspicuous sinners in point of reverence for God.

But if any one swears by God's members not in the strict sense, but in a 38 sense which is consistent with His Divine essence and with reverence for Him—for example, if any one swears by God's right hand, meaning God's omnipotence, or by God's all-seeing eye, meaning God's omniscience, and so forth—he is not to be reckoned a blasphemer, but rather to be swearing in a metaphorical form of speech by the true God.

Of course, it is permissible, without any breach of decency, to swear by the members of our Saviour Christ, He being in respect of His human nature complete man, as Covarruvias explains (place named, n. 17).

So also, an oath on the wounds of Christ will be a genuine oath, and will 39 mean that the swearer is taking an oath on the help of God ordained to issue for our eternal salvation from the wounds of Christ; and in that sense, too, an oath on the Holy Gospels of God will be interpreted, namely, as referring to the Divine help whereby provision is made for our salvation by means of the Gospel Word.

- 40 It is to be noted (4) That oaths of infidels, such as Turks and the like, taken on the Supreme Being or the Creator of the universe are truly and effectively made, although these same people do not know the Blessed Trinity; for their knowledge of God the Creator and Upholder of all things, derived from the light of Reason and imperfect though it may be in respect of Revealed Truth, is none the less true knowledge, as I proved above in the chapter on Religion. (Add Covarruvias, place named, n. 24.)
- 41 Note next (5) That any pacts or stipulations which may be made instead of an oath, "*Angelobungen an Eids-statt*," are void of the bond of a genuine oath as regards any guilt of perjury. For their force and efficacy is this, that the swearer pledges himself to the truth as if he had taken a true and real oath; and therefore it is manifest, from that implied obligation of good-faith and from the facts, that an oath and an undertaking of that kind instead of an oath are two different things, although before God and in the forum of conscience it may be otherwise.
- 42 Much less do promises on simple faith, *bei meiner Treu*, attain by the external law of nations to the rank of an oath even although made by royal or illustrious persons. It is indeed true that a promise made on royal or princely faith is reckoned as good as an oath, but this is by enactment or the custom of Germany, not by the law of nations. So much, then, of a general character about the definition and form of oaths.
- 43 In order that oaths may be properly made, according to the standard of St. Jerome, on *Jeremiah*, ch. 4, the concomitants mentioned in c. 2, C. 22, qu. 2 must be present; namely, truth, justice, and judgment. But this of course must be understood of the forum of conscience. It means that the swearer must be satisfied in the tribunal of his soul that he has not sworn wrongly; that is, that he has sworn the truth, in a lawful and honorable business and under the compulsion of necessity. (See fuller explanation hereof in Covarruvias, on c. *quamvis pactum*, part 1, § 6, n. 4, onwards; and Barbosa, on c. 2, C. 22, qu. 2, his whole title.)
- 44 It is easy to see, then, that, other things being equal, oaths are lawful and that Christ does not mean to forbid them where (*St. Matthew*, ch. 5) he enjoins on his disciples to swear not at all, neither by the earth nor by Jerusalem; for the intent of that injunction, is, to remove the promiscuous abuse of swearing to which certain persons are lightly addicted, irrespective of need and simply as a bad habit. This may be seen in St. Augustine (*Sermo domini*, bk. 1, ch. 30), and in Gratian (on c. 5, C. 22, qu. 1).
- 45 The fathers certainly took that passage in the Gospel to refer either to an oath on creatures (as St. Jerome, on *St. Matthew*, ch. 5) or to an oath taken as a luxury and without any necessity (as St. Augustine, on *Epistle to Galatians*, ch. 1, at end); Gratian gives these references (on c. 8 and c. 13, C. 22, qu. 1). And this interpretation is more generally received, according to the canonists, on the passages quoted, and more probable than that of Grotius (place named, ch. 13, § 21) to the effect that the Gospel rule utterly

forbids the promissory oath. Ziegler disproves this doctrine in his *Annotations* on the passage named; and there is no real trace of any support for Grotius' opinion in that Bible text. For, when Christ says to his disciples ἔστω δὲ λόγος ὃμῶν ναὶ ναι, οὐ νοῦ, "Let your yea be yea and your nay nay," this is equally applicable to the assertory oath in the sense already given, so as to mean that, when making any assertion or promise, the disciples are not to swear recklessly but are constantly to observe truth itself in their words and deeds; and it amounts to an express injunction to avoid that bad habit of swearing which I have just alluded to.

Just as it is enough in the assertory oath for the swearer not to swear 46 recklessly or wilfully to what is untrue, so in the promissory oath it is enough that what he swears to is within the compass of his power and that he thereafter performs it, or at any rate that it is not his fault if the matter sworn to be not performed.

Felden (on Grotius, passage cited) makes an exception of the oath of 47 fealty which the subject takes to the magistrates; his reason is, that otherwise any act in breach thereof subjects us to Divine punishment and to the displeasure of God. But this seems to me to be the case with any promissory oath; for instance, in a promise to pay a debt, even if any oath be put on one side, the debtor is liable to Divine punishment and displeasure if he does not do what he is bound to do. The same holds of a vassal who takes the oath of fealty to his feudal lord; and of a soldier swearing obedience to his commander; and also in the public business of nations, when Kings or peoples make a peace or treaty with one another and confirm it with an oath, for they are bound even apart from the oath to perform, and are liable to God's anger and punishment if they fail therein. So far, then, we see that the principle 48 is the same in all promissory oaths; namely, that if we promise under oath to perform an obligation, we are liable, on breach of faith, to God's punishment and displeasure, quite irrespective of the oath, and the same liability arises on breach of faith in the case of other oaths: and, while it must be admitted that in other promissory oaths a man may swear without hurt to his conscience, an exception seems less reasonable than anywhere else in the case of the homage done by subject to magistrate.

I plainly confess that not all the cases of a promissory oath are equally 49 certain, but that what is sworn to is sometimes more and sometimes less within the discretion of the swearer. If, for example, a merchant, be he never so rich, promise under oath the payment of a given sum of money and then, by the blows of fortune, becomes unable to pay, he is quit of the wrong of perjury but is not free from fault; for he ought to have contemplated these ups and downs in human affairs, and the possibility of such a misfortune overtaking him. These external gifts of fortune are not within our control.

But the case is different where a vassal swears fealty to his lord, or a 50 subject swears obedience to the magistrate, or where a King makes a truce or peace or treaty with another King or people. In these cases it is within the

power of the vassal to be faithful to his lord, and of the subject to obey the magistrate, and of the King or Prince to observe the terms of the truce or peace or treaty, etc.; and they can not be directly compelled to contrary acts, albeit that the will sometimes gives way before the shock of some greater apprehended evil.

51 The more control, then, we have over future events, the more safely we may promise under oath with regard to them; and the more these events are at the mercy of chance, the more rash it is to take a promissory oath concerning them, and therefore, in accordance with the precept of Christ, we ought then to abstain from an oath, not because it would not bind if taken, but because, in accordance with Christ's precept, we ought not to create an obligation by means of such an oath as would, if recklessly taken, make it so easy for the swearer to be guilty of perjury—if not of the deliberately wrongful kind, at any rate of the kind which springs from blamable recklessness.

52 Briefly, Just as no oath, whether assertory or promissory, may be taken simply out of a bad habit and without cogent cause, so a promissory oath about a future event which is outside the promisor's control, ought to be avoided as far as possible, because of its uncertainty. To that extent I agree with Grotius; namely, that we ought to abstain from promissory oaths respecting events of this kind which depend not on the discretion of the promisor but on fortune. But I should say that even such an oath is lawful if the following conditions be satisfied:

53 (1) The swearer is compelled by some outside circumstance, or in some way or other is driven, to take an oath; as, for instance, where his word would not be accepted without an oath, yet he must make the contract or promise because of the order of some superior or of some public or individual interest.

(2) The swearer limits his undertaking to perform his promise to his best exertions, as is expressly done in the oath taken by a vassal, *Consuetudines feudorum*, bk. 2, 7, where, in a statement of the incidents of vassalage, we have the words, "and if I shall learn that you are proposing a lawful attack on any one and I shall thereto receive either a general or an individual summons, I will furnish my aid to you so as I shall be able." Clearly, if in such a case the swearer be prevented from performing his promise, he can not be convicted of deliberate wrong-doing or of culpable recklessness; for he has saved himself in such an event by the words of his oath.

55 (3) The oath contains a proviso about knowledge, so that, where your failure of performance is due not to impossibility but to ignorance, you are still exempt from liability for perjury. The aforementioned formula of the oath whereby the vassal promises aid to his lord is an example of this, for it not only limits the promise to the vassal's best exertions but also contains a reservation about his knowledge.

56 We gather, accordingly, that every oath, assertory or promissory, is lawful nowadays, but not unless there be a cogent cause for its being taken; and that even where there is a necessary cause, greater caution is at times

requisite to prevent the swearer from incurring the guilt of perjury or the stigma of fault.

Leaving this, let us now pass to the objects of an oath; these are closely connected with the previously mentioned concomitants, especially with justice and judgment. Firstly, then, an oath should be about a right thing or deed; for, as Pope Boniface VIII says in c. 100, *de regulis juris*, in vi, an oath taken in defiance of good morals is null. That which is in itself sinful or wrong can not be made right by the abuse of the Divine Name, as if one were to swear to commit adultery or murder or theft, or the like. The reason usually given herefor is that what is base and wrong, and repugnant to good morals, is treated as impossible for us to do; so says Papinian in *Dig.* 28, 7, 15.

This is the case, of course, when we are speaking of good morals from the standpoint of the Law of Nature; for good morals which are contrasted only with Positive or Civil Law have not equal authority as regards the oath, as Covarruvias (*De Testamentis*, part 2, nn. 9, 31) well says in a case of revocation of a will containing a gift of all the testator's property in pursuance of an oath. We can boldly assert this view with regard to the Law of Nature and of Nations, although by the received opinions of the doctors it is considered wrong for an oath to be valid which offends against good civil usages (doctors, on *Dig.* 45, 1, 61). But if we look at the cases of the alienation of a dotal estate with the wife's consent given under oath, and of the renunciation of an inheritance in pursuance of an oath (c. 28, X. 2, 24; and c. 2, bk. 1, 16, in vi), we can not affirm thereon that an oath is valid even in matters which are forbidden by the Civil Law; and this view is confirmed by *Authentica, Sacra menta puberum*, *Cod.* 2, 28, 1. Now, good civil usages as such and good civil laws as such are in effect equal one to another (*Dig.* 1, 3, 32); and so, in consequence, an oath which is opposed to good civil usage is valid by the Law of Nature and of Nations despite those usages, just as it would be despite a civil law. This is not inconsistent with the assertion of Covarruvias (place named).

Secondly, it follows from what has been said, that the object of an oath ought to be some possible act or thing; for if the argument whereby an oath with an immoral object is reckoned as having an impossible object can avail to nullify such an oath, much more should an oath that has an actually impossible object be held of no binding effect.

In this and the preceding case, however, it may be doubted whether an oath of this kind with an immoral or impossible object is not valid, at least so far as to render the swearer guilty of perjury. I think not; for if such an oath is not a genuine oath by reason of defect in its object, its obligation can not be supported under the law of perjury. Who would say that one who had sworn to counterfeit the coinage was bound to carry out his undertaking? Yet it is certain that in such a case the boldness of the man in taking that wrong oath deserves punishment. I therefore think that in the forum of the soul they who recklessly swear to do what is immoral or impossible are guilty of profanation of the Deity and of dishonoring conduct towards the Divine

Majesty, but not of perjury if they fail to carry out what they have so wrongly sworn to. You see, then, that only things possible and upright are the objects of oaths which are in proper form and which really bind, and that things impossible and immoral are excluded.

63 Now, what if the man who swears to do what is impossible or improper believes that it is possible or proper? I think it must be judged by the circumstances of the case, especially with regard to propriety or impropriety, seeing that this is a matter for the light of Reason to render clear, and not matter of opinion.

64 But as regards the possible or impossible, another distinction is needed. For some things are absolutely one or the other; and these can be pronounced on by the nature of the case, and there is no room left for human belief, as, for instance, if you swear that you will not die or that you will fly in your lifetime to the sky; for it is not likely that any one should be so silly as not to know that these things which are sworn to are outside human power. Other things are only relatively impossible, and it is clear that they can be brought to pass; but whether or no they are within the power of the swearer is not so clear. We have an example of this class, for instance, when a man swears that he will go within two days to a place twenty German miles distant; for, although the thing is possible in itself and greater distances have often been covered in the time by unimpeded runners, yet whether the swearer is himself equal to the task is open to doubt.

Things, then, which are naturally impossible in the first way, do not lend themselves to being sworn to with obligation; and if the oath be not kept, there is no perjury in the external forum committed, there being, as Celsus says (*Dig. 50, 17, 185*), no obligation in connection with the impossible and therefore none in connection with an oath to perform the impossible. But it is otherwise with the things in the second class; for, just as one who promises a sum beyond his means is bound, so is one who promises an act which in itself is possible but which exceeds his power. And so, by the Civil Law, if the promise be not kept the payment of pecuniary awards falls within the obligations of the case.

Certainly, he who promises with an oath anything impossible either to him, or naturally, or morally, is inexcusable before God and in the forum of conscience for his profanation of the Deity; for either he knew the nature of what he was promising and that it could not be brought to pass, or only with difficulty and doubtfully, or at any rate he ought to have known it.

67 In an assertory oath there is a difference between those things which are naturally impossible and those which are morally impossible. As regards the former an oath is not permissible, perjury being manifestly committed by the swearer, especially if we are dealing, in the manner mentioned, with things absolutely impossible. But where it is a case of moral impossibility, the principle in operation is a far different one. For, in accordance with the foregoing, no one can properly promise under oath that things morally impossible shall be done; yet no rule of morality prevents the taking of an oath that they

have been done, and this whether the sworn assertion relates to the swearer's own acts or another person's.

All this shows that oaths should be classified not so much by reference to their forms—for, so far as obligatory force goes, this is the same throughout, as we saw in the examples of the Execratory and Attestatory oaths—but by reference to their objects. The Promissory oath, which has for its object 69 future things or acts, is one thing; and the Assertory oath, which has for its object past things or acts, is another. To these the doctors often add another variety, the Confirmatory oath; with this the Spanish jurist Gutierrez deals at length in a book devoted to the topic.

In reality, however, speaking of the Law of Nations and absolutely, the 70 Confirmatory oath may, according to the different circumstances, be brought under one or other variety, either the Promissory or the Assertory; for one who confirms an act or a business either promises that he will ratify it in the future or asserts that it was valid in the past—if not in itself, at any rate so far as concerns his own consent and authority.

Interpretation of oaths should not be dependent so much on the force 71 of the words used as on the probable intent of the swearer, and should be tempered with equity if the oath has been given to another. Hence Celsus well says in *Dig.* 38, 1, 30, “If a freedman has sworn to render such services as his patron decides on, the patron’s choice will not be ratified, save so far as it is equitable. The motive of those who substitute another’s discretion for their own, is in general a hope that the substitute will exercise a proper discretion, and not a wish to be even unreasonably bound.” On this principle it can safely be asserted that the oaths of vassals and subjects should not be made to cover unreasonably burdensome services.

But when there is no ambiguity in the wording, the heads sworn to must 72 be observed to the letter, however hard they may seem; and the swearer who has bound himself by such an oath has only his own easy-yielding character or fortune to thank therefor, provided the objects be not immoral or impossible. And I entertain no doubt that oaths must be specifically performed, without any substitution of an equivalent performance, and this although in obligations of fact a person is as a rule discharged, according to the common opinion, by paying the value at stake (doctors, on *Dig.* 45, 1, 72).

Some modern writers contradict this—I do not, however, propose to 73 join in the disputation—but they adopt a different attitude if an oath has been added to the obligation, saying that in this case the undertaking must be specifically performed. Such was the opinion given by Jason (vol. 1, cons. 9), Alexander, of Imola (vol. 2, cons. 91, n. 6), Romanus, Zasius, and other doctors, on *Dig.* 45, 1, 72.

We will not linger on the well-known rule that an oath does not change 74 the nature of the act to which it is adjoined, being content with Zasius’ answer (place cited) that though an oath does not extend its operation beyond the kind of act or business to which it is added, yet it can render the obligation more stringent and can intensify it.

75 The case is relevant, here, of one who has promised under oath to pay and wishes to resort to a set-off. The canonists hold that this can not generally be done (on c. 7, X. 2, 24). Bartolus (on *Dig.* 46, 8, 15) defends the opposite view, and so do many others mentioned by Covarruvias (*Relectiones* on c. *quamvis*, bk. 1, 18, in VI; part I, § 4, n. 16). For this, Covarruvias (n. 17) gives satisfactory reasons, of which the following is a summary: That the word "payment" includes set-off in it (*Dig.* 20, 4, 4); and this goes so far that the law of testaments, in which specific performance obtains, allows set-off instead of payment (by inference from *Dig.* 35, I: 55 and 44, together with 40, 7, 20, 2; Zoes, *Commentary on Pandects*, n. 15 on tit. 16, 76 2). And I hold that this is so quite apart from the Civil Law, and that by the Law of Nations it is just that set-off should be counted a mode of payment. Where, however, it is a compromise that has been sworn to, it is different, though here it appears that any payment of a penalty by the promisor must be imputed to him as satisfaction of the obligation—this is asserted to be a disposition of Positive Law by Cardinal Zabarella (cons. 92, n. 14, at end) and, following him, by Tuschus (*Conclusiones practicae*, vol. 4, 527, n. 7, letter I. See *Nov.* 82, ch. 11), but I fear that it does not hold of the Canon Law or, at any rate, of the simplicity of the Law of Nations, according to which the rules of compromise as they stood under Justinian did not obtain.

77 In sum: A promissory oath creates an obligation to perform exactly what has been sworn to, though, as already said, it is subordinated to the nature of the act to which it is annexed; thus, a testament is in itself and in its nature revocable, and it can not be made irrevocable by an oath. For this there is the authority of a rescript of the Emperors Severus and Antoninus, mentioned in *Dig.* 30, I, 112, 4. Nor does an oath make a gift *mortis causa* irrevocable, unless an express provision against revocation has been added. (On this see *Dig.* 39, 6, 27.)

78 An oath of non-revocation, then, produces different effects on a testament and on a gift *mortis causa*, not creating any obligation in the external forum in the former case and creating one in the latter. In the forum of conscience, however, I do not think this distinction can be admitted, nor under the Law of Nations; for the matter sworn to can be performed and is not repugnant to natural morality, whatever may be the case as regards Positive Law. And so the tradition of the canonists is that such oaths must be kept, and are consequently valid (on c. 28, C. 2, 24; and c. 2, bk. 1, 18, in VI).

79 Further, it is certain that the formula "provided things remain in their present condition" must be understood in an oath. If, therefore, some notable change of circumstance takes place, of such a kind as in all likelihood was not within the contemplation of the swearer, the obligatory force of the oath must not be extended to the new situation. We have an example of this when a man makes a gift of all or a part of his property and thereafter children are born to him; the gift then becomes revocable despite any oath to the contrary, according to Bartolus, Baldus, and Cumano, on *Dig.* 31, 87, 3.

This is based on sound reasoning, a vow—which is not less efficacious than an 80 oath—being similarly of restricted operation when confronted with the interests of after-born children. (See Hostiensis, Sylvester, Navarrus, and others quoted by Sanchez, *De matrimonio*, bk. 10, disp. 9, n. 15.) And so St. Augustine (c. 43, C. 17, qu. 4) approves the conduct of Aurelius, Bishop of Carthage, who, having received a gift from a person who had no children, returned it to the giver when children were subsequently born to him; and St. Augustine adds that though the gift could have been retained by the Law of the forum (because, according to the better opinion, *Cod.* 8, 55, 8 does not hold against the Church), yet by the Law of heaven it could not.

The foregoing makes it easy to see that acts which are in themselves illicit 81 or repugnant to good morals from the standpoint of the Law of Nature are not made valid by an oath. The same applies to an act directly forbidden on grounds of public expediency. (See Zoes, n. 65, onwards, on *Dig.* 12, 2.)

And what if it be primarily in private interests that the act is forbidden? If the prohibition be in the interests of the swearer, the oath legalizes it even in the external forum, as where a minor has given a promise under oath (*Authent.*, *Sacramentum puberum*, *Cod.* 2, 28, 1), or where a woman renounces the benefit of the *SC. Velleianum* or a paternal inheritance (Zoes, place named, n. 67).

But if the prohibition primarily concern the other party, being (say) 82 unfavorable to a creditor, the oath does not make the act valid, as in the *SC. Macedonianum*, or in matters of usury, or in a proviso for foreclosure of a mortgaged property or fief, although the oath is operative to the extent that an absolution from it can be obtained (Covarruvias, on c. *quamvis*, *Relectiones*, part 2, § 3, n. 6).

It is indubitable that every oath is an essentially personal matter, and 83 that no one but the swearer is made liable by it to a charge of perjury; and so, though it binds his remotest heirs and successors on the footing of agreement, yet they can not on breach be held guilty of perjury. (See a fuller treatment of this in my public lectures on *Dig.* 2, 14.)

Lastly, note on the other side that the validity of an oath may be 84 impeached not only because the object is immoral or impossible or prohibited, but also on the ground that it was obtained by fraud or duress brought to bear on the swearer by the other party, or by any mistake on the swearer's part (text of, and doctors on c. 2, bk. 1, 18, in vi). Moreover, a release from the obligation of an oath, even during its subsistence, may be obtained either from an ecclesiastical judge (c. 1 and c. 15, X. 2, 24), as regards the unfettering of the conscience, or from a secular judge, as regards its operation in the external forum (*Dig.* 50, 1, 38, pr.). And the constitution of our Empire about release from oaths as regards litigation thereon, belongs to this place (*Ordinance of the Reichskammergericht*, part 2, tit. 24).

Let this suffice as a brief treatment of the very large subject of this chapter.

CHAPTER XXVIII.

Of the Rights of a Victor over the Vanquished and their Property.

SUMMARY.

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| <p>1. What Victory is.
 2-5. Even a victory which is not won by force is a true victory.
 6. In whatever various ways victory is obtained, it produces its effects under the Law of Nations.
 7, 8. Victory is of two kinds: either victory in the war or victory in a battle.
 9-13. The effects of victory in a battle.
 14-18. The effects of victory in the war.
 19-22. Formula of a surrender into good-faith.
 23. Victory ought not to be pressed to dishonoring acts.
 24. Over-severe practice of the Jews after victory not consonant with Law of Nations.
 25. The victor may rightly demand the surrender of the authors of the war.</p> | <p>26. Victories ought not to be pressed to the violation of holy things.
 27. The limitations hereon.
 28, 29. The rights of a victor in the non-sacred property of the vanquished.
 30. Whatever remission of his strict rights a victor makes to the vanquished is a matter of grace, and not of obligation under the Law of Nations.
 31. Whether a victor can claim payment to himself of the debts owed to the vanquished.
 32. How far the rewards of victory are to be shared with allies.
 33, 34. Victory does not give an indefeasible right to the victor without an agreement made by the vanquished, if they have not come into his power.</p> |
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I We come now to the rights of a Victor over the Vanquished. For sometimes a war ends, not in a Peace or a Treaty, but in a Victory. That happens when the two combatants are not equally matched, but one side is much stronger in arms than the other. Now, although there are different degrees in this, as will appear later on, yet in general we may define Victory as the prevalence in arms over an enemy—not that it is an absolute necessity for the enemy to be overcome in battle in order that one side may come off conqueror, but it will be enough for this result to be reached in any way whatsoever.

2 Thus, Fabius Maximus reckoned to defeat Hannibal by sitting quiet, saying to the Consul Æmilius, in the fine speech which Livy gives us (bk. 22) :

“ We are carrying on war in Italy, in our own country and on our own soil. All around us are our fellow-countrymen and allies in abundance. With arms, men, horses, and provisions, they do and will assist us. Such proofs of their fidelity have they given in our adversity. Time, nay, every day, makes us better, wiser, firmer. Hannibal, on the contrary, is in a foreign and hostile land, amidst all hostile and disadvantageous circumstances, far from his home, far from his country: he has peace neither by land nor sea; no cities, no walls receive him; he sees nothing anywhere which he can call his own; he daily lives by plunder. He has now scarcely a third part of that

army which he conveyed across the Ebro. Famine has destroyed more than the sword; nor have the few remaining a sufficient store of provisions. Do you doubt, therefore, whether by remaining quiet we shall not conquer him who is daily sinking unto decrepitude and who has neither provision nor supplies, nor money?"

In the same connection, mention must be made of the Samnite victory 3 over the Romans at Caudium, and, in general, that mode of conquest which is due to mind rather than to muscle. "Nine times," says Tiberius in Tacitus' *Annals*, bk. 2, "he had been sent by the Emperor Augustus into Germany, and had accomplished more by skill than by force; it was in this way that the Sugambri surrendered, and in this way that the Suevi and the King of the Marobodui were bound by a treaty of peace."

And it was this kind of victory that, in the last century, the Dutch looked 4 for when the Spanish army was driven off from the siege of Leyden, not by fighting, but by opening the sluices. Upon this is found this neat verse in Van Meteren (*History of Belgium*, bk. 5) :

Lugdunum cingit Batavorum miles Iberus,
A Batavo contra cingitur ille mari.
Non opus est gladiis ferroque rigentibus armis,
Solæ pro Batavo belligerantur aquæ.

(The Spanish soldiery surround Leyden of the Dutch; it, on the other hand, is girt round with the Dutch Sea. No need of swords or iron-shod arms; the water maintains a single combat for the Dutch.)

And a little later:

Invenit ratio sine sanguine pellere longe
Hostilesque manus Hesperiumque jugum.
Tolle metus, Hispane, fuge, et ne respice terras
Pro quibus Oceanus pugnat et ipse Deus.

(A bloodless way is found, to drive far off the hostile force and yoke of Spain. Fear, Spaniard, flee; look not on the land for which Ocean fights, and God Himself.)

Aye, even when victory is won not by skill or valor, but by the direct 5 intervention of Heaven, it deserves the name of a true victory. Such as this was the victory in the Bible, won by King Jehoshaphat over the Edomites, Moabites, and Ammonites (2 *Chronicles*, ch. 20); and that of King Hezekiah over the Assyrians, whom the angel smote (2 *Kings*, ch. 19; 2 *Chronicles*, ch. 32; and in *Isaiah*, ch. 37). Such also, in profane history, the victory of the Emperor Marcus Antoninus over the Catti and Marcomanni, on which Claudian has the lines:

Laus tibi nulla ducum, nam flammeus imber in hostem
Decidit, hunc trepidum dorso fumante ferebat
Ambustus sonipes, etc.

(For thee no praise of the commanders, for a rain of flame falls on the foe, whom panic-stricken the scorched charger bore on his reeking back, etc.)

6 All this makes it clear that whether victory be due to valor or to skill or to Divine interposition, it has its due effects under the Law of Nations, it being enough for you to prevail over the enemy's arms, even though you do not conquer him by arms but obtain the mastery in some other way. And it makes no difference whether military valor was conjoined to the protection of Heaven, as in the wars of Joshua, Gideon, David, Asa, and other Kings and generals of the Jews, in the Bible, and as, in ecclesiastical history, in the wars of the Emperors Constantine and Theodosius—there is extant a verse commemorating the admirable victory of the last-named over Eugenius and Arbogast:

O nimium dilecte Deo, cui militat æther,
Et conjurati veniunt ad classica venti :

(O greatly loved of God, thou for whom the air fights and to whose fleet come the conspiring winds)—

or whether the victory was won by a sheer miracle, as was that of Jehoshaphat (place named); for in all of these ways the victor enjoys the rights over the vanquished of which I am speaking.

7 Now, it is obvious that degrees of victory may be distinguished so that the victor has correspondingly varying degrees of right over the conquered and their property. In this connection, the difference between victory in the war and victory in a battle must not be forgotten. Hannibal, according to Livy (*History*, bk. 30), admitted in the Carthaginian Senate that he had been beaten by Scipio not only in battle but also in the war. On the other hand, Tacitus (*Annals*, bk. 2), although recounting how Arminius, the leader of the Cherusci, had been overcome in a great battle by Germanicus Cæsar, yet pays him the following glowing tribute at the end of the book: "He was undoubtedly the liberator of Germany. He had not, like other Kings and generals, to contend with the Roman people when it was at the beginning of its power, but when it was a highly prosperous Empire. Herein he met with varying fortunes in battle, but in the war he was not conquered." This being so, it is clear that victory in a battle is not the whole business, seeing that battles have frequently been won by those who were defeated in the war, or in the issue the war has been indecisive or at least doubtful, as happened in this century in the Thirty Years' War in Germany. And Perseus, King of Macedon, had the upper hand at the beginning of his war with the Romans; yet he was so far from a decisive victory that the Romans, though beaten in a cavalry engagement, would not make peace with him on any other terms than that his destiny and the destinies of all Macedonia should be submitted to the Roman Senate (Livy, *History*, bk. 42).

9 To return to our topic: Victory in battle is not, then, to be gauged in and by itself, but by reference to the effects which the victor can produce at that juncture by his superiority in arms, as regards, for instance, the taking of prisoners and plunder and the occupation of cities and such like. Thus, the victory of Ferdinand III over the Swedes led to the surrender of

the town of Nordlingen, which was then besieged; and the victory at Wittstock brought about the delivery of the fortress of Werben to Banér; and there are many other similar cases. Such a victory depends very much on the facts of the case, because the beaten side generally fixes its thoughts on a recovery of its military fortunes and so does not mean to yield more to the victor than he has actually appropriated or taken. Thus, we have here the notable example 10 set by the Romans after their disastrous defeat at Cannæ; despite it, they would not entertain terms of peace but bade Hannibal's messengers quit Roman territory before sundown. It follows that victory in a battle is but an avenue to victory in the war and, if the victor does not use it properly as such, all the fruits of that victory are wasted. The Duke of Alva made this clear after the victory of Pavia, in his fine address to the Emperor Charles V (Guicciardini, *History*, bk. 16).

Nevertheless, the victor in a battle has the exercise of his belligerent 11 rights over the vanquished. He may kill those who continue to make forcible resistance, and by modern usage may keep his prisoners until their ransom is paid; so, too, the things that he has captured from the enemy become his, and all those permissible consequences of war which I have spoken of above come into operation with the victory in this engagement. If, however, the victor fails to utilize these, he is deemed to squander or neglect the profits of victory. On this point Maharbal insisted as follows, in his advice to Hannibal after 12 the victory at Cannæ: "Nay, that you may know what has been achieved by this battle, five days hence you shall feast in triumph in the Capitol. Follow me; I will go first with the cavalry, that they may hear of my arrival before they have heard of my approach." And when Hannibal shuffled and pleaded the difficulty of continuing the march, Maharbal retorted: "Of a truth the gods have not bestowed all things upon the same person. You know how to conquer, Hannibal; but you do not know how to make use of victory."

So the effect and advantage of a victory in battle lie in the use made of 13 it, as said above. All the same, a victor is not allowed to deal just as he likes with those whom he has thus beaten; but in utilizing his victory he must observe the restraints imposed by the Law of Nations. For instance, he may not wantonly kill those whom he has received into his good-faith, nor violate his female prisoners—for what has modesty done wrong, that it should suffer the violence of the enemy? When the captive wife of Ortiagon, a prince of the Gallo-Græcians, was thus assaulted by a Roman centurion, she is said to have slain him and so avenged the affront; Livy recounts this memorable deed (*History*, bk. 38).

The effects of victory in the war are ampler, yet they are not always the 14 same; for the victory may be either limited by the terms of an agreement or unconditional. In the former case the victor acquires no more rights than are assured to him by the agreement. And Phœneas, the ambassador of the Ætolians, pressed this point on the consul Acilius, maintaining "that the

Ætolians had surrendered themselves into the good-faith of the Romans, and not into slavery" (*Livy, History*, bk. 36). Here must be classed all those cases in which the vanquished have not come entirely into the power of their conqueror, but retain their liberty in accordance with the agreement, either altogether or limited by the terms agreed on. This was so in the first and second Punic wars and in the wars with Philip and Antiochus, and in many other wars in which the Romans came off best in arms but the war did not issue in the destruction of the conquered people or the overthrow of their dominion.

15 Now, according as the victory in war is in itself more decisive and absolute, so does it give more decisive and ample rights to the conqueror. Scipio Africanus had this in mind when he said to Masinissa, "Syphax was subdued and captured under the auspices of the Roman people; therefore he himself, his wife, his kingdom, his territories, his towns and the population thereof—in short, everything which belonged to him is the booty of the Roman people" (*Livy, History*, bk. 30).

16 But in this argument a distinction must be drawn between what is allowed to a victor by the Law of Nations and what is rather a matter of human vanity and boasting. A victor undoubtedly has the right of putting to death those of his enemies who have fallen into his hands without any agreement for safety or a surrender, but in such a way that it is inhuman to exercise this right against any or all of them indiscriminately. And that is why the Spartans can not be approved for the severity they showed to the surrendered Platæans, all of whom, according to Thucydides (*Peloponnesian War*, bk. 4), they slew. Nor is the cruelty of the Corcyraeans to the Corinthian prisoners to be imitated. They made them pass in bands of twenty between files of armed men who killed them (Thucydides, bk. 4). Nor that of the Romans, or at any rate of the consul Fulvius, towards the Campanians. After his occupation of Capua, the Senators of that town were beheaded (*Livy, History*, bk. 26). Nor that of Germanicus Cæsar towards the Cherusci. In order to finish off the war, he ordered his soldiers to put to death all of that nation after their defeat in battle (*Tacitus, Annals*, bk. 2).

18 These and similar examples show that it is permissible by the strict Law of Nations to kill a captured enemy, for there was never any dispute in these cases about any violation of the Law of Nations; yet it is clear enough that what was done was done in the heat and lust of revenge and also to provide against what was feared might happen in the future. Much finer and nobler was the opinion of Octavius Cæsar given in Appian (and quoted by Grotius, *De jure belli ac pacis*, bk. 3, ch. 20, § 50): "When the question is forward What have the captured enemy deserved? it must at the same time be asked, What does it beseem their conqueror to do? and the latter consideration I put first." A celebrated instance of that clemency occurred in the treatment of Porus by Alexander the Great; next to none of the attributes of royalty were taken from that captive King, save the name only.

Of the formula of surrender into good-faith, which was frequent of 19 old in the wars both of Greeks and Romans, Grotius says (place named) that it denotes naught but a mere surrender, and that the use of the word "good-faith" in that context means only the probity of the conqueror to which the conquered entrusts himself. This is consistent with what Polybius says was the Roman interpretation of the formula; namely, that one entrusts oneself to the good-faith of another, and gives the conqueror free power to decide on one's fate. But in the story of Phœneas a distinction is drawn between surrender into good-faith and surrender into slavery. What is to be said then? I do not think there is any variance between the formula of sur- 20 render into good-faith and a reference to the discretion of the victor, tempted by considerations of what is good and just. For it is a probable intention of those who entrust anything to another's discretion that he shall exercise that discretion in a proper manner, and not that they propose to bind themselves even beyond due limits (see Celsus, in *Dig.* 38, 1, 27). Accordingly, a victor ought not, in virtue of a surrender into his good-faith, to use his victory insolently, but with such an observance of moderation that he allows the vanquished whatever he can allow without hurt to safety of his State. For if 21 what he enjoins on them is essential to prevent his victory being wasted, the vanquished ought to submit with patience and do their utmost to obey.

And so the case of the Ætolians who took exception to the requirement of Acilius that the authors of the war should be surrendered, must be defended rather on the actual difficulty thereof, these persons not being in the power of the Ætolians, than on the exact wording of the formula of surrender into good-faith. But I do not mean to say either that the consul Acilius was right in referring the interpretation of the surrender to the usage of the Romans or that the ambassador Phœneas was right in referring it to the usage of the Greeks; for it ought to depend on the equity of the Law of Nations, and not on the customs of either side; and it was, accordingly, open both to the Roman consul to refuse consent afterwards to its being interpreted in Greek fashion, and to the Ætolians to decline to be treated as within the absolute discretion of their conqueror. In a word, no result was reached, as 22 happens whenever parties differ about a matter and as the issue of that matter showed: the Ætolians treated the transaction as if it had never taken place and, sorry as their plight was, had recourse again to arms until they obtained a truce through the mediation of Quintius, a man of consular rank; and later on, through the good offices of the Athenian ambassador in the Roman Senate, they obtained a peace.

The right of a victor, then, in accordance with what has been said, is to exercise unlimited dominion over those who have surrendered unconditionally, but where the surrender is a qualified one his right must depend on the terms of the agreement. But in every surrender, unless the safety of the state calls for an example of severity, it befits a conqueror to display mildness and clemency. This by way of summary.

- 23 Whatever be the nature of the victory, it must not be pressed to cover dishonoring acts. The Law of Nations forbids a victor to abuse his victory by the violation of honorable women and by the slaughter of infants and those who are too young to have caused or helped in the war. What Camillus said to the schoolmaster who had come to make a perfidious betrayal of the Faliscan youths, was fine: "We do not carry arms against that age which is spared even when towns are taken, but against men who are themselves armed, and who, not having been injured or provoked by us, attacked the Roman camp at Veii." (*Livy, History*, bk. 5.)
- 24 The examples to the contrary furnished by the Children of Israel, who spared neither age nor sex in their extermination of the peoples of Canaan and their other enemies, as we read in more than one place in the Bible, do not touch the general rule of Law but come from a particular command of Divine vengeance; or, if any such event occurred without a Divine command, it ought to be treated as an historic instance of severity and cruelty and not as matter for imitation. In this last class I should place the use made of David's victory over the Ammonites (*2 Samuel*, ch. 10; *1 Chronicles*, ch. 19).
- 25 It is undoubtedly consistent with the Laws of Nations for a victor to proceed against the authors or instigators of a war. This was a regular custom of the Romans. It tends towards the security of the peace; for the impunity of their former conduct does not then prompt the restless fomenters of war to plan a new outbreak. With this end in view the Romans, in the peace which they gave to Antiochus, demanded the surrender of Hannibal first of all, because they felt that they would not have peace in any part of the world where Hannibal was.
- 26 Again, the rights of a conqueror ought not to be extended to the desecration of sacred places and things or of anything that belongs to religion. At the end of the war, such ingratitude should not be shown to God, to Whom the victor owes his victory, as to offer violence to temples or things dedicated to His worship. Aye, and during the war also, belligerents should use their best endeavors to spare such things, as appears from what has been said already; and the claim of these things to immunity ought to receive especial consideration among Christians.
- 27 But, of course, pagan temples and images and idols, and whatever is connected with such-like superstitions, must not be preserved by the conqueror, for the true God, Creator of earth and sky, is not worshiped hereby; but they ought rather to be broken up and destroyed.
- 28 As regards the non-sacred property of the defeated people, the victor's rights must be measured by the nature of the victory. If the victory be absolute and complete, all such property is acquired by their conqueror; and that is the point made a little way back, in our quotation from *Livy* concerning Scipio's victory over Syphax and his speech about its effect, and also in the distinction made above when I was dealing with war and asked whether things captured in war are booty or go to the victor under whose auspices the

war is being waged. When, however, the victory is a limited one, the conqueror acquires only such property of the conquered as he has seized in the course of the war or has obtained after the victory by a treaty of peace.

Wherefore, the victor does not acquire the regal rights even of a conquered and captured King, unless he has won those rights by arms also or has obtained them by agreement. The defeat and capture of Francis I, King 29 of France, at Pavia by Charles V, did not invest the latter with any right to the Kingdom of France; nay, Francis wrote from captivity that the administration of his realm was not to proceed on the assumption that he was, so to say, dead. This is a striking example as regards a kingdom of the successory order; and the point is even clearer as regards an elective kingdom. For no one had any doubt, for instance, that, despite the overthrow and capture of the Emperor Valentinian by the Persians, the Roman Empire continued on its former legal footing, and that no right had accrued to Sapor, the King of the Persians, except over the person of the captive Emperor, and certainly none over the Roman Empire. The same must be admitted if it be an absolute monarch who falls into the power of his enemy, as Bajazet fell into the power of Tamerlane; and this is rightly so, since captivity is comparable to death, as we just saw was suggested in the case of King Francis.

Now, in every victory, if the conqueror waives any of his rights over the 30 conquered, be it as regards person or as regards property, this is matter of grace and not of obligation under the Law of Nations, as Alexander the Great said in his own case to the ambassadors of Darius, according to Quintus Curtius (*History*, bk. 4).

A further point for discussion is, Whether a conqueror can demand 31 payment to himself of the debts owed to the conquered and whether by the law of nations the debtors are bound to pay him. It seems so, because a right to all the property of his opponent passes to the victor and the aggregate of rights in question includes debts and obligations.

And so Alexander the Great, in virtue of his rights as conqueror of Thebes, is recorded to have made a gift to the Thessalians of a debt of a hundred talents which they owed the Thebans. And the *Instrument of Germanic Peace*, art. 4, § *debita*, points to the same thing, namely, that debtors who have been compelled to pay their debt by the forcible constraint of the enemy and who prove the actual payment and the forcible constraint can not be proceeded against in any executive fashion except when the irrelevance of these pleas appears within the period of two years.

And what about allies? Must the spoils of victory be shared with 32 them? I think so, if the alliance be on equal terms and the victory have been obtained by the joint forces. But the legal position will be different if the alliance be on unequal terms, like that between the Romans and their Latin allies; or if the victory has been won by one of the peoples alone—like the victory won in the last century by Charles V over the French—in that case the sole victor need not share the fruits of victory with his allies.

33 Lastly, it is easy to see that victory does not give an indefeasible right to the property seized by the victor, if the vanquished has neither fallen into his power nor given a retrospective consent thereto; for the vanquished has a right to try to get back his property by war. We see this in the case of Masinissa, who was conquered and driven from his throne by Syphax and then was restored by the Roman arms as a victor; also in the case of Ferdinand of Aragon, who lost the possession of the Kingdom of Naples to Charles VIII of France and was subsequently restored by a successful war. And so the right which is set up by agreement is in that respect stronger—namely, as regards the parties to it, and not as regards any third party, for he can not
34 be prejudicially affected by an agreement between others. We see the force of this qualification in the case of Francesco Sforza. He was able to regain his ancestral principality of Milan from the French in war, despite the cession of it which his brother Maximilian had made to the King of France after the battle of San Donato.

Let this suffice on the legal results of a victory.

CHAPTER XXIX.

On the Rebellion of Conquered Peoples.

SUMMARY.

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| 1-7. Whether, and to what extent, rebellion is approved of by the Law of Nations.
8. The speech of the Latin prætor, Annius, as given in Livy.
9, 10. Are those from whom the right of making war has been taken away permitted to rebel when their liberty is restored? | 11, 12. The causes of rebellion on the part of a people who have been allowed to retain their liberty.
13-18. The effects of victory by or over rebels, according to different circumstances. |
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At first sight the subject of this chapter seems to be one of fact merely, 1 and not to touch the Law of Nations; for that Law detests rebellion, as is evidenced by what I said above, namely, that rebel subjects have no belligerent rights against their rulers. The sense of the word "rebel," as here used, is set forth by the Emperor Henry VII, in his *Extravagans* "*Qui sint rebelles.*" He applies it to those who, in breach of their fealty to the Empire, commit or contrive any act of rebellion whatsoever against the honor of the Emperor and the prosperity of the Empire. These persons get the name "rebel" *a rebellando*; that is, because they resist the Emperor and his officials in the execution of their trust. This shows that rebellion connotes a kind of subjection; in it those who are bound by an oath of fealty perfidiously engage in schemes against the Emperor or his empire.

It was such conduct as this that called forth the denunciations of the 2 consul Titus Manlius when the ambassadors of Latium demanded the creation of a second consul of their nation in defiance of existing treaties (Livy, *History*, bk. 8). "Were these the treaties," said he, "that our Roman King Tullus concluded with the Albans, your forefathers, Latins, and which Lucius Tarquinius subsequently concluded with you? Does not the battle of Lake Regillus occur to your thoughts? Have you so far forgotten your own calamities and our kindnesses towards you?"

Now, there are different degrees of victory; and sometimes the losers 3 are allowed to retain their belligerent rights, as in the answer of the prætor Aemilius to the Samnites, "With regard to the Sidicinians, they did not interfere with the Samnite nation having the free decision of questions of peace and war." (Livy, *History*, bk. 8.) Accordingly, when just cause arises, rebellion is in such a case admissible by the Law of Nations; and I think this holds good not only when belligerent rights have been expressly

reserved, but also when they have not been expressly taken away. This is consistent with the Roman reply (Livy, place named) to the petition of the Samnites that the Latins and Campanians should be restrained from ravaging their territory and kept down by armed force. "The case of the Campanians," they said, "was different, they having come under their protection not by treaty but by surrender; accordingly, the Campanians would remain quiet whether they wanted to or not. But in the Latin treaty there was no clause preventing the Latins from going to war with whomsoever they pleased."

And we must interpret this to mean a discretion to go to war with the victor himself, if he do any fresh hurt to them, as well as with third parties. 5 When King Philip of Macedon had been beaten in war and had accepted terms of peace, he said, "My dispute is not now with the Maronites or with Eumenes, but with you yourselves, Romans, from whom I have long time seen that I can obtain no justice," etc. And then, after a long exposition of his grievances, he adds at the close, "It matters much in what light you choose to regard me. If as an enemy, continue to act as you have begun; but if you have any respect for me as a King in friendship and alliance with you, I must beg you not to judge me worthy of such injurious treatment." (Livy, *History*, bk. 39.) Philip is reported as having no doubt that it was a case of renewal of war.

6 In the same way, we read how the Sabines, Aequians, Volscians, and Samnites, and a number of other nations who had been conquered by the Romans in war, often made war afresh when new causes arose; and there was never any question about their right to do so, but only about the adequacy of the causes. The same thing may be seen, in the history of Saxony, to have occurred in renewal of war with Charlemagne.

7 Two cases must be distinguished at the very outset: The victory is either absolute—and in that case the conquered are subdued and retain no right of rebellion, their belligerent rights being in the circumstances of the case lost; or the victory is limited and confirmed by the victor with certain conditions of peace—and in this case a rebellion for just cause (that is, an entrance on a new war) is permitted, provided the cause is adequate and satisfaction is not obtainable, and provided belligerent rights have not been expressly taken away from the conquered.

8 Of course, what the Romans told the Latins, in the above-cited passage from Livy, about the right to make war not being forbidden by the treaty, must be ascribed rather to the political motive of cloaking the imminent Latin war than to the Law of Nations; for the prætor Annius discloses the fact that the Latins were under limitations with regard to their belligerent rights. "We waged war," he said, "with the Pelignians in our own name. They (to wit, the Romans) who formerly did not even concede to us the right of defending our own territories by our own exertions, interfered not. They heard that the Sidicinians were received under our protection, that the

Campanians had revolted from themselves to us, that we were preparing armies against their allies the Samnites; yet they stirred not from the city. Whence this great forbearance on their part, except from a knowledge of our strength and their own?" (Livy, bk. 8.)

When, by the terms of peace, a victor leaves the conquered their freedom of law but takes from them the choice of peace or war, it is a more difficult question whether a fresh outbreak of war is permissible for some fresh and cogent reason. I think it is permissible, because the victor, by furnishing fresh cases of serious hurt, undoubtedly violates the terms of the peace, and the conquered is no longer bound by his undertaking not to make war without the victor's assent. It was in this way that Philip of Macedon determined for good cause to resort to war and make good his cause against the Romans, although one of the terms of the peace on the occasion of his former defeat was that he was not to make war outside Macedonia without the authorization of the Roman Senate.

Indeed, if we look at the matter closely, a term of this kind in a peace is seen to relate rather to third parties, it being somehow of interest to the victor that the conquered should not make war on others; for reason shows the inconvenience of interpreting the term to relate to a war on the victor, it being absurd to look for the victor's own consent to a war on himself. And it is no obstacle hereto that, as said above, wars are at times made with the consent of both parties; for that is so only between equals, and not when one party has been beaten by the other. It would, moreover, be an unreasonable construction to put on a term in a peace, that one party must be content to suffer fresh wrongs and to be entirely barred from the wonted redress of the Law of Nations. For we ought not in public any more than in private business to foster agreements which invite a breach.

The special causes of new war may be various, as, for instance, when the conquered people will not give in, short of being utterly humbled by the conqueror, or when their religion or liberty would be jeopardized if left to proposed terms of peace; for although these could not be wantonly used as ostensible cause of rebellion by rebel subjects, yet we are here dealing with conquered peoples who have been left in enjoyment of their liberty, like the Carthaginians by the peace at the end of both the first and second Punic wars, or who at any rate have given no absolute consent, either by token of surrender or by conduct, to the forcible imposition of dominion over them. This it was which enabled the Athenian exiles, under the leadership of Thrasybulus, to expel the thirty tyrants and regain by force the victory which had been wrested from their fatherland by force, in a way not open to lawful subjects, in whose case rebellion is as a rule a most heinous crime and utterly unlike the renewal of war for just cause by a vanquished people, or the armed and lawful assertion of one's own right.

The differences in the kinds of rebellion lead to corresponding differences in the effects of victory in the renewed war. In this, either the King or

sovereign people, on the one hand, come off victors or, on the other hand, those who have taken up arms again in revolt. In the former case, where subjects are in revolt, extremely severe measures may be taken, by way of example, against them if vanquished; yet even here it is proper to display a certain amount of clemency, and to allow the offenses of the general body of rebels to be expiated by the punishment of the leaders of the revolt. From that standpoint we have Scipio Africanus saying to the mutineers, "Therefore, as far as relates to the general body of you, if you repent of your error I shall have received sufficient and more than sufficient atonement for it. Albius the Calenian and Atrius the Umbrian, with the rest of the principal movers of this nefarious mutiny, shall expiate their crime with their blood." (*Livy, History*, bk. 28.)

14 If, however, the vanquished were not subjects, their treatment should be even more lenient. The Romans repeatedly gave peace on equal terms to the Samnites who, after their defeat, had again taken up arms. The Romans also displayed the like moderation in other wars. This was admitted by Hasdrubal Hædus, the Carthaginian ambassador, in his petition for peace, where he said "that the Roman people were invincible because, when successful, they forgot not the maxims of wisdom and prudence, and that they had extended their empire more by sparing the vanquished than by conquering." (*Livy, History*, bk. 30.)

15 Now, whatever be the appropriate maxims for Political Science to address to victors, it is nevertheless no part of the Law of Nations to say that previously conquered peoples who, on a just ground, have renewed the war, should on that very account receive harder terms of peace when again 16 conquered; for the victor has only himself to blame if he has furnished a cause for the renewal of the war; and if those who make this new war fail in it, it is equitable that such recourse to arms, being the only way in which they could assert their rights, should not be turned to their destruction.

17 In the converse case, namely, where those who have taken up arms afresh win the day, the distinction between rebel subjects and other nations must again operate. For the former acquire no right by their victory, it being quite improper that the crime of rebellion should confer sovereignty on subjects, however victorious their arms may be. What they gain is matter of fact only, as was the case with Cromwell, and the like. But it is different in special cases, as where subjects have flown to arms because of the King's notorious violation of the fundamental laws of the kingdom, or where their ruler's assent has been subsequently added to the gains they have made in war (with this point I have dealt above).

18 If, however, it be a previously conquered nation that gets the upper hand, the same principle obtains as formerly applied in its favor; namely, that the matter should be adjusted on fair and just terms, without excessive severity; and the common rules of war and victory must be observed here, to wit, that the new victor should remove all cause for war and provide for his own

safety by repairing the hurt that has already been done. It is manifest that this was Hannibal's intent, and would have been his attitude had he succeeded in conquering the Romans; for he told his prisoners after the battle of Cannæ “that he was not carrying on a war of extermination with the Romans, but was contending for honor and empire; that his ancestors had yielded to the Roman valor, and that he was now endeavoring to make others yield in their turn to his good fortune and valor.” (*Livy, History*, bk. 22.)

These are the few remarks I have to make on this topic.

CHAPTER XXX.

Of the Ways in which Sovereignty is Extinguished or becomes Vacant; and of the Rights of the Estates in the latter event.

SUMMARY.

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| 1-3. Different stages in the life-history of States; whether they are inevitable.
4, 5. A vacant and an extinguished sovereignty are different things.
6, 7. States are extinguished by hostile seizure, and by surrender.
8-14. The effect of surrender into good-faith.
15, 16. Sovereignty may end by release of the tie between governor and governed.
17. Sovereignty may come to an end by a change of rule in a State.
18, 19. Whether a King can alienate his sovereignty without his people's consent.
20. A successor in the throne is not bound by a contract of his predecessor which is repugnant to the laws of the kingdom.
21. Whether a King who alienates part of his realm in violation of the Law can contravene his own act.
22. Whether a King is to be deemed usufructuary or owner of his realm.
23. A King who gives his subjects an undertaking not to alienate is bound thereby.
24-36. Whether, and to what extent, a King or the whole civil body can alienate a part of sovereignty and citizens.
37-39. Whether vassals may alienate.
40. Alienation of territory not to be confounded with a transfer of citizens to a foreign sovereignty. | 41-44. Defense of jurists against Grotius, with regard to the alienation of part of a realm on the ground of necessity or expediency.
45. The Law of Nations does not allow the grant of realms or parts of realms as fiefs, without the assent of the population.
46. Parts of realms may be given in pledge.
47. Whether the patrimony of the people is an exception to this.
48, 49. The death of a King makes the throne vacant; the death of those at the head of an aristocracy or democracy has no similar effect.
50. A throne may be vacated by abdication.
51. To what extent abdication is permissible.
52. A throne is vacated by deposition.
53. Examples in the Roman and the Romano-Germanic Empires.
54. The rights of the Estates when the throne is vacant.
55. The Vicariate of the modern Empire is threefold.
56, 57. The Palatine Vicariate under the Instrument of Peace defended.
58. Whether the Estates are really free during an interregnum.
59, 60. Transference of the Romano-Germanic Empire after the Carolingians defended. |
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1 Just as the life of a man is distinguishable into various ages, so there are stages in the life-history of States. They grow up from small beginnings, attain the amplitude of their power, and then decline and die. Many illustrations of this are available, but none more luminous than that afforded by the varying fortunes of Rome.

2 The Roman State had its babyhood and infancy in the Kingly period; under the Consuls and up to the time of the foreign wars, notably the Punic War, it had its youth; afterwards it spent its manhood and virile age in joining to itself numerous conquered parts of the earth; at last, when Monarchy was restored, it began to totter towards old age, and then, under the invasion

of its enemies, the weaker outlying parts fell and were split up into various separate Kingdoms.

I admit that no such periods have been divinely appointed to human 3 Kingdoms and Empires; when these arrive, a State comes to an end not under the stress of inevitable necessity, but, as appears from Daniel, under the disposition of the All-wise Supreme Ordainer of Kingdoms and His providence of particular causes. These causes the political philosopher considers in conjunction with their demonstrable effects. For example, if any one asks why the immensely powerful Roman Empire of old perished, the causes are at hand: usurped power, luxury, military license, extreme neglect of arms, by which vices the sinews of public safety and administrative vigor were cut through. And the philosopher will predict a like fate for every State where no one prudently remedies such mischief.

The Law of Nations adopts a different standpoint, and considers in the 4 abstract the ways in which governmental rule may come to an end or a throne and seat of rule be vacated. Between these two things there is a difference: Governmental rule comes to an end when it is utterly extinguished; but the seat of government is vacant when in point of fact there is no ruler, and the choosing of another is in the hands of the Estates or people. Of the former Pericles says, in the funeral oration (?) given in Thucydides, bk. 2:

“ Know that our city has the greatest name in all the world because she has never yielded to misfortunes but has sacrificed more lives and endured severer hardships in war than any other; wherefore, also, she has the greatest power of any State up to this day; and the memory of her glory will always survive. Even if we should be compelled at last to abate somewhat of our greatness (for all things have their times of growth and decay), yet will the recollection live that of all Hellenes we ruled over the greatest number of Hellenic subjects.”

Of a vacant seat of government, Tacitus says (*Annals*, bk. 2): “ When 5 Ariobarzanes had been accidentally killed, (the Armenians) refused to submit to his children, and after trying the experiment of a female sovereign, named Erato, whom they soon deposed, they, being irresolute and disorganized, and in a state of anarchy rather than of freedom, placed the wanderer, Vonones, upon the throne.” According to this, the death of a ruler does not bring the government to an end, properly speaking, but renders the seat of rule vacant; for, though it is true that they who have been taken by death out of the seat of government are at an end, yet this is not the case with the government, absolutely considered. It would not be correct to say that the German Empire is at an end by the death of an Emperor, and the same holds of other realms. The position is well put in the passage quoted from Tacitus, where we are told that the Armenians were rather without a lord, through the death of Ariobarzanes, than in a condition of freedom.

To return, then, to our topic: Sovereignty comes to an end (1) By 6 forcible seizure; for what an enemy takes by right of war ceases to be ours.

And so, if he has seized the whole realm, that whole is lost to us; if a part, then that part is lost. We have examples of this mode in the ending of the old Western Roman Empire under Augustulus and of the Eastern under Constantinus Palæologus. The former of these monarchs was acting under the compulsion of Odoacer, King of the Heruli, and was the last of the old line of Emperors at Rome; the latter was conquered in war by the Turkish Sultan, Mahomet II, and was the last of his line at Constantinople.

- 7 (2) Sovereign power is lost by surrender. This occurs when a King or free people submit themselves to another. We have an example of it in Livy's *History*, in the case of the Falisci. They were moved to a spontaneous surrender to the Romans by the good-faith of the Romans and the integrity displayed by the general Camillus in restoring the youths who had been betrayed into his hands. Their ambassadors are reported to have spoken as follows on the matter in the Roman Senate:

"Conscript Fathers, overcome by you and your commander in a victory at which neither God nor man can feel displeasure, we surrender ourselves to you, considering that we shall live more happily under your rule than under our own law. A conqueror could wish for nothing more glorious than this! In this issue of our war two salutary examples have been set to mankind: you preferred good-faith in war to present victory; and we, put on our mettle by your good faith, have voluntarily given you the victory. We are under your sovereignty. Send men to receive our arms, our hostages, our city. They will find the gates open. You shall never have cause for repentance as regards our good-faith, nor shall we as regards your sovereignty." (Livy, *History*, bk. 2.)

- 8 It is immaterial whether the surrender be compulsory or voluntary, as long as it is genuine and absolute. In this business, men of olden time were at pains to employ a formula for a surrender into their good-faith. In this formula the conquered committed themselves and their fortunes to the conqueror in reliance on proper and just treatment. We must enquire what force such a formula has.

- 9 A notable instance of its employment is given in Polybius and Livy in connection with Phœneas and the other Ætolian ambassadors. They had carried out a surrender into the good-faith of the Romans; and thereupon the consul Acilius had ordered their countryman, Dicæarchus, and Menetas the Epirot, and Amyntander, with the Athamanian chiefs, to be forthwith delivered up to him, it being they who had counseled a defection from the Romans. At this Phœneas, interrupting, said, "We surrendered ourselves not into slavery, but into your good-faith; and I assume that it is from insufficient acquaintance with us that you fall into the mistake of commanding what is inconsistent with Greek practice." The consul retorted, "I do not much concern myself at this present with what the Ætolians may think conformable to Greek practice, so long as I, conformably to Roman practice, exercise authority over men who just now surrendered themselves by a decree of their own, and were before that conquered by my arms. Wherefore, if my orders

be not speedily obeyed, I now order that you be put in chains." (Livy, *History*, bk. 36.)

It is clear here that different interpretations were put on the formula of 10 surrender into good-faith by the Roman consul and by the Ætolian ambassadors. Grotius (*De jure belli ac pacis*, bk. 3, ch. 20, § 50) supports the Roman interpretation, that by this surrender into good-faith naught is meant save simply surrender, and that the word "good-faith" means naught save the victor's probity, into which the vanquished is committing himself.

I think that it is a question of fact, namely, What did the parties intend 11 by the formula, and especially how do they usually employ it? For if the formula of surrender into good-faith is on one side taken to be subject to a tacit restriction within what is proper and just, as, for example, that the bodies and certain property of the surrendered persons are to be respected, the victor can not exercise absolute mastery over them; he would have to concede thus much if the surrender had been expressly made conditional thereon (see Grotius, place named, § 51, on this point), and why should not the same thing hold where the surrender is tacitly made conditional thereon?

But it is asked, What are the presumptions which, in such a case, show 12 this tacit consent? I answer that they will probably be found in the circumstances and plight of the surrendered; for if there still remains to them any hope of success in arms, it is not likely that the meaning of a surrender into good-faith is left to the victor's discretion. The case of the Ætolians just mentioned illustrates this. In that same war against the Romans they resumed their arms and fortified Naupactus; and, despite the defeat of Antiochus, whose allies they had been, they continued the war for some time, until a more honorable peace was obtained.

The best statement of the underlying principle is that given in another 13 context by Celsus (*Dig.* 38, 1, 30), that it is not likely that any one intends to bind himself without any limit, by words of obligation framed at the other party's choice, but only within the limits of the proper and just. Victors ought to respect this principle in dealing with vanquished who have surrendered on terms of clemency or discretion ("auf Gnad oder Ugnad," as our people like to put it). Such words as these must not be taken to mean an absolute 14 discretion in the infliction of evil, but a discretion tempered by the rules of the Law of Nations. Consequently, no violence must be done on the bodies of those who have surrendered, unless, maybe, they are the instigators of the war and so might do much mischief subsequently; with this point I have already dealt in the chapter on a victor's rights.

A third principal mode in which sovereignty comes to an end is by the 15 ruler's consent to a release. This occurs when he declares the subject population to be free, and releases them from the fealty, in the way in which, admittedly, many Italian city-States received back their liberty from the early Romano-Germanic Emperors. This mode is available not only in a monarchic State but also, without doubt, in other forms of polity.

16 It is, however, to be restrictively interpreted, not because the ruler ceases to rule, but because he thereafter no longer rules the nation or people to whom he has agreed to concede their liberty, as when liberty, or the exercise of liberty, was, as we read, conceded to the Dutch by the King of Spain, and to the Swiss by the Romano-Germanic Emperor in accordance with the *Instrument of Peace*, art. 6.

17 Then, fourthly, sovereignty may obviously come to an end by transference. This happens in two ways: either by a change effected within the State, as when the sovereignty of the people was, as we read, made over at Athens to the four hundred, and later on to a larger body, and at Rome to the Emperor; or by a change effected outside the State, as when the Roman Empire of the West was made over by the Greeks to the Germans. This fourth mode differs from the last-mentioned one in that there is no grant of liberty as in that case, but only a transference of dominion. From this stand-point it was objected to the Athenians that in the war against the Medes they had fought for dominion, so that they might change the former condition of the other Greeks, their allies, into a less bearable one.

18 In this connection the interesting question is mooted, Whether a King can or can not alienate his sovereignty without his people's consent. Grotius says that he can in a patrimonial kingdom, because it is within the King's absolute discretion, but that he can not in a limited monarchy. (See *De jure belli ac pacis*, bk. 2, ch. 6, § 3, onwards.) In the same place Grotius draws a similar distinction with regard to the alienation of a part of a kingdom; I have written above on this matter.

19 The same principle holds with regard to a ruler's agreement to release her subjects, because a King or Prince can no more release a State or a subject people from their fealty than he can transfer his own rights to another, unless he has full dominion and power of disposition. Wherefore, I do not doubt that, notwithstanding the release, subjects who have been so released from their fealty contrary to the laws of the realm may be brought back into their 20 former condition. It is of course of the succeeding King's act that I am speaking; for although he must observe those contracts into which his predecessor has entered on behalf of the realm, he is nevertheless not bound by those transactions which offend against the laws of the realm.

21 It is harder to assert that a King who has alienated a part of his kingdom, or who has given back their liberty to a subject people contrary to the fundamental laws of the State, can himself go counter to his own act. Why it is hard to assert this, appears from the parallel case in which alienations of feuds without the lord's consent are held valid against the alienor. And another principle enforces this difficulty, namely, that laid down by Grotius (place named, § 11)—if we accept it—that a King's position is like that of a usufructuary. Now a usufructuary may certainly alienate his right to use and enjoy the property without impairing its substance; but he can not destroy or transfer, to the prejudice of the reversioner, any of the rights which are inherent in the property.

It is, however, more probable that the legal position of a King is not that 22 of a usufructuary; and Grotius (place named) does not make the comparison absolutely, but only in regard of the patrimony of the people; that is to say, he contends that the King has no right other than usufruct in that property which belongs to the people and which only serves the King for the purposes of aliment and the up-keep of the royal dignity. But as regards the sovereignty or regal right which a King has over his subjects and their property, this is more correctly compared to ownership, so limited by pacts or the laws of the realm that it is inalienable, in accordance with what Giurba (*Decis. Sicil.* 79, n. 37, onwards) wrote about the possessor of a majorat.

Further, if by special pact or privilege a King has promised or granted 23 to his subjects that they shall not pass into another's power, as was formerly promised to certain States of the Empire, I think that an alienation without their consent would be invalid. What, then, in such a case? I think the sounder view is that the people or Estates would cancel the alienation in the lifetime of the King who made it, and that he might himself do the same, in accordance with principles already set out—yet not in order to benefit himself, but in order to preserve the rights of the people, whose welfare he ought to watch over in virtue of his kingly office. This is, nevertheless, subject to the condition that if the King revokes his grant, he must make it up in other ways to those with whom he contracted.

But let us discuss Grotius' other doctrines, laid down in the same place. 24 Grotius claims, for the purpose of his argument, that a part of the State, that is, this or that Estate, may have greater rights in the interests of self-preservation than the whole body has over that part (§§ 5, 6). Why does he say this? and to what end? Why, to show that it is lawful, if necessity urges, for the part to sever itself from the whole in order to preserve itself (§ 5), but not lawful for the whole to sever the part from itself and give it into another's sovereignty against the wishes of the part (§§ 4, 8). If I ask for 25 the reason of this difference, Grotius gives it in § 6, That the part is availing itself of a right which it possessed before the formation of the whole, but this can not be said of the whole. But let the reason of the reason be given; for it also is not free from doubt. Necessity, says Grotius, which brings the matter back to the Law of Nature, can not apply here (he means, in the alienation), because the right of alienation is introduced by act of man and takes its measure from that. Or, as he more clearly put it, The severance of a part from the whole body is an act of the Law of Nature when a case of necessity arises, but not so alienation whereby the whole severs a part from itself; therefore the former is on this showing permitted, but not the latter.

Now, I think this doctrine neither sound nor expedient for rulers: not 26 sound, because, as long as a part is included within a civil whole, there must be a reciprocal obligation of defense and assistance, and those who combine to form one State are not to be deemed to intend that any individuals should be at liberty, on an allegation of necessity, to withdraw themselves from the

whole; and, as this capability is at the same time, and with the same inevitability, withdrawn from the others, what is the foundation or presumption on which this unequal obligation rests?

27 Further, Grotius errs in comparing the whole and a part of a State one with the other; he ought rather to set up one part over against the remaining parts and mete out on the same principles the same law to both sides. Let the Roman colony of Sinuessa serve to illustrate this. Of it Minutius says, in Livy (*History*, bk. 22) :

“Are we come here to have the pleasure of seeing our allies butchered and their property burned? If we are not moved to shame for others, are we not for these, our fellow-countrymen, whom our fathers planted in Sinuessa in order to protect this frontier from the Samnite foe? That frontier is now wasted with fire, not by the neighboring Samnite, however, but by a Carthaginian foreigner who has come as far as this from the remotest parts of the world through our dilatoriness and inactivity.”

28 Events showed that Minutius was wrong and that Fabius Maximus was right. Fabius could not succor the people of Sinuessa without injury to the public; and he deemed it the better course to save the Roman State rather than to imperil it by the defense of one of its colonies. It is, then, more correct to say that in a case of necessity there is no difference between the obligation of the whole civil body to the part and that of the part to the whole; and, therefore, if a part may sever itself from the common and mutual obligation, so may the whole, or, better, the remaining parts.

29 Some one may, however, say that it is not yet clear about an alienation of a part which is effected by the King or people; for a severance of a part from the whole in a case of necessity is a somewhat less thing than an alienation whereby a part of the State is, maybe unjustly, subjected to a foreigner's power; and while there may, of course, be a severance which results in a grant of liberty to a part without the whole, yet an alienation whereby the transferred part is subjected to a new ownership without its consent, does not appear to be opposed to the Law of Nations.

30 I answer that the question admits of a distinction; for if we are speaking of a jointly-ruling part of a State, I freely admit that it can not, on a plea of necessity, be subjected to a foreign power. For example, there is no doubt that the Roman plebs could not be subjected by the Senate, nor the Senate by the plebs, to the power of any foreign King or people whatsoever, no matter what necessity we may suppose to be overhanging the Republic.

31 A different principle, however, applies to the case of mere subjects; for they, however unwilling, may be involved in an alienation, not, indeed, a direct alienation of themselves—as we see in the legal rule about freedmen (*Dig.* 10, 2, 41; and 10, 37, 24)—but an alienation of a given part of a realm or territory. This would be entirely in accord with the Law of Nations, especially when there is an urgent necessity. For who denies that Kings and free peoples have lordship over their subjects irrespective of their consent,

and that these subjects (I except, throughout, special agreements to the contrary) may be transferred to others even against their will? Now, it being clear that by the Law of Nations a man can agree to transfer his property to others, those who would withstand the application of that rule here will have to rescind the acts of Kings and free peoples which have been done in the interests of peace or to meet other emergencies—a proposition which, as I said before, is scarcely expedient for rulers.

In a word, a jointly-ruling part can not be severed from the rest of the 33 civic body, not even on a plea of necessity, because equal has no power of alienation over equal; but there may be a severance as an act of all the parts together, should public safety require it—although this is said merely in view of the Law of Nations, and it would be better and more honorable to imitate in adversity the examples of constancy set by men of old, such as is commended in Tacitus, *History*, bk. 4.

If, however, we are speaking of genuine subjects, it follows from their 34 condition as such that their consent is not necessary in a separation or alienation, as Alexander Raudensis (*Resp. pis.*, vol. 2, resp. 4, n. 20) writes, following the recorded *Decisiones Tarragon.*, 882, especially when their condition is not made worse thereby, and this applies, I imagine and experience confirms, even apart from a case of necessity, as Cravetta (cons. 411, n. 20) advised concerning the alienation of Castra Scandiani Vinazani (?) and Casalgrandis (?) by the Duke of Ferrara, and as Alexander, of Imola (*Cons.*, vol. 5, cons. 1, nn. 17, 18) advised about the subinfeudation of the district of St. Thomas by the same Duke to the Marquises de Gonzaga, and as Alciatus (cons. 77) advised about the severance of the town of Arona from the duchy of Milan by the Dukes of Milan.

We see this happen pretty often, too, in our Germany. This or that 35 part of a territory is severed or alienated, sometimes with and sometimes without the consent of the subjects; and the Law of Nations raises no obstacle thereto, provided it be consistent with the laws of the Empire or province. But if the condition of the subjects is made worse thereby, I think it humarer 36 that an alienation or severance of territory including its inhabitants should not take place except on the score of necessity or public expediency (Vasquez, and those he cites, *Controversiae illustres*, bk. 1, ch. 9).

What holds in the case of vassals? The correcter doctrine, obtained 37 by arguing from the less to the greater, is that they, being free men, can absolutely not be alienated. The principle is the same as that named in the case of subjects. For, although there is a great difference between vassals and subjects—vassals not being subject to their lord save in respect of their fief, while subjects are such absolutely—yet in this matter of alienation the principle is the same, as regards the Law of Nations; namely, When there is a cause of invalidity in the object to be alienated, the alienation is invalid. Further, if we look into feudal customs, we find that a lord can not, by alienating the direct lordship, effect a consequential alienation of the vassals,

because by the very act he loses his proprietary right (*Feudorum consuetudines*, bk. 2, 26, § *domino*; and bk. 2, 55, § 1, at *præterea*).

None the less, the Law of Nations, such as Kings and Princes and States employ, admits, and usage sanctions, this way of alienating vassals, as the work of supreme power or a power similar thereto. High testimony to the truth of this is furnished by the *Instrument of Germanic Peace of the year 1648*, where we read of various grants and transfers to other persons, with full alienation of the appurtenant vassalages and such-like rights, in such
39 a way that they who aforetime were vassals to such and such a lord were from that time assigned to a new lord and were bound to recognize him, whether they liked it or not. Moreover, I do not see anything to prevent an overlordship being assigned to another; and Grotius (place named, § 7) has a sound passage to the effect that a part of a people have in this matter a free will and a right of contradiction (he means, as regards their transference to a foreign
40 power). But in the following sections he seems erroneously to confuse an alienation of a territory or a part thereof with a transference of the citizens or a part of them into a foreign dominion. Now, the word "citizen" is here used in the Aristotelian sense, to refer to those who share in the legal institutions of the State; and a competent dominion over such persons can not, against their will, be obtained by another through grant or alienation. All the same, it does not follow herefrom that a King or free people may not sever a part of the realm or territory; and Grotius admits as much in § 7.

41 I am, then, at a loss to understand what Grotius means in § 8, and why he dissents from those jurists who add to the rule that a part of a realm is inalienable the two exceptions about public expediency and necessity; for these jurists are not speaking about the alienation of a part of the citizens of a free people, but of a part of a territory, saying that, where this is as a rule forbidden to a ruler, it must be held permissible in cases of public expediency and necessity. There is a strong presumption that the framers of the rule would admit this, for they had not before their minds a future case in which alienation would be highly expedient or necessary in public interests.
42

Let us illustrate this by property which is subject to a fideicommissary substitution. This property can certainly not be alienated to the prejudice of those in whose favor the trust was created (*Cod. 6, 43, 3, 3*), yet the alienation of it by way of dowry or in consideration of marriage is admittedly valid if enough has not come to a child by way of legitim (*Nov. 39, 1*, and
43 *Authentica, Res quæ*—under *Cod. 6, 43, 3*). In this enactment the lawgiver subjoins the following pregnant principle: "What is for the common good of all must be put before what is for the particular good of some only." Here, then, we have a striking exception, based on public policy, to a rule of Private Law forbidding alienation. And the principle above laid down by Justinian must equally hold in the public affairs of Kings and nations, unless we are prepared to say that the Emperor had no power to cede, in the interest of public peace, the fortress of Neovilla in Hungary to the Turks, and the

Venetians no power to cede Candia to them, nor the Kingdom of Poland Caminieck.

And it is not to the point to object that the places named were already 44 in the occupation of the Turks, because a voluntary cession takes priority over a military occupation, a distinction already made above. If, then, by the Law of Nations, a part (in the sense named) of a realm or territory can not be alienated without the consent of the inhabitants even on grounds of public expediency or necessity, the same holds good of a place which the enemy has seized, seeing that any hope of recovering it is lost by an agreement to cede it.

And as regards enfeoffments also, I think there is nothing in the Law of 45 Nations to prevent them being quite properly made, although they would be rendered void by escheat for felony or failure of issue, or any other thing that determines the right of the feoffor. Grotius' doctrine, I think, leads to this result also (§ 9); but he holds that a grant of a kingdom as a fief, made by the King without consulting his people, would be nugatory, either because the grant is repugnant to the fundamental pact and the laws of the realm or because it has been subsequently annulled, for I do not see that it is void as in any way repugnant to the Law of Nations.

Grotius is of the same opinion (§ 9) concerning a pledge of a part of the 46 realm, holding that this can not be created without the people's consent; but in § 13 he qualifies this, admitting that it can be done by a King who has full sovereignty, that is, one who has a right of imposing fresh taxes for good cause; and he gives as additional argument, that the people can pawn their patrimony to the King to secure their debt to him, and that the people is bound to redeem the thing which has been put in pawn for a good reason.

But I can not accede to this without a grain of salt; that is, save where a 47 tax has been imposed of an unobjectionable amount but the people is reluctant to pay it and the King or Prince has great reason for hastening its payment. For it is not likely that the patrimonial property of the people, assigned as if by way of usufruct for the support of the King, should be pawned, save in some most extreme case of necessity or public expediency. And even if we assume it has been so pawned, the people will not be liable beyond the amount of the tax; and when that has been paid to the King, the obligation of pawn subsisting between the people and the person to whom the property has been transferred is released by operation of Law, in accordance with *Cod. 8, 23, 2.*

And if, as Grotius adds (§ 10), the King or Prince be only usufructuary of the people's patrimonial property (the contrary of which, however, we admitted a little while ago), so much the less can he, consequently, alienate that kind of property (by inference from *Cod. 8, 23, 1.*).

Leaving this topic, we must now proceed to speak briefly of the ways and 48 means whereby the seat of government becomes vacant. They are: (1) The death of the ruler. In an elective kingdom the matter is clear. In a successive kingdom the vacancy happens on a total failure of the royal stock which

49 is in the succession. But in an aristocratic or popular State death can scarcely cause a similar vacancy, because the members of the governing body do not all die together, and those who replace the dead do not constitute a new Senate or people, but the Senate or people is deemed to preserve its identity although its members all pass away one after the other. So Alfenus holds (*Dig.* 5, 1, 76).

When a state is thoroughly destroyed, or ploughed over like Carthage of old, this is not a case of a vacant seat of government but of a government at an end.

50 (2) Abdication of the kingdom or principality belongs here. This leads to an offer of the sovereignty being made to a new King or Prince, except where the abdicating person had at the time a colleague in the sovereignty, as history tells us Constantine Cæsar, who afterwards won the name The Great, was of Diocletian and Maximian. More modern instances of the abdication of a monarch are those of the Emperor Charles V, Queen Christina of Sweden, and King Casimir of Poland.

51 But it is asked, Whether such an abdication can be admitted under the Law of Nations. Not indiscriminately, but only when at a right time and for a good reason. For just as sovereignty begins in consent, so the sovereign can no more withdraw himself from his subjects without cause than they without cause can repudiate his scepter. And so, in all the examples just given, solicitous care was plainly taken throughout the proceedings, to manifest the justice of the grounds on which the throne was abdicated.

52 (3) Deposition must also be named as one of the modes of creating this vacancy. It occurs when a King or Prince is put down from his kingship or principality for misconduct, as when the Romans declared some of their Emperors to be enemies, like Nero, Maxentius, Heliogabalus; and in the Romano-Germanic Empire there are the examples of Charles the Fat and Wenceslaus, the former of whom by a pronouncement of the Estates, and the latter by a decree of the Electoral College, was removed from the Imperial dignity. I will not speak here of Henry IV, Henry V, Frederick I, Otto IV, Frederick II, and other Emperors who were removed by Papal ban, as also happened to Henry III and Henry IV, Kings of France, and also to Queen Elizabeth of England, because the power of the Pope so to remove a King is called in doubt by Protestants, as also the grounds of these various removals.

54 It remains to speak of the legal position of the Estates in case of a vacancy in the seat of government. It is then their duty to take steps at once to prevent the State sustaining hurt through being too long without a head. In our Empire we find it carefully provided in the fundamental Law, the *Golden Bull*, that when the Electors have ascertained (too soon!) the death of an Emperor, they shall meet together to elect a new King of the Romans, to be the future Emperor.

And in order that they may have due time in which to discharge their 55 arduous duty, provision is made there at the same time for an administration, during an interregnum, by Vicars, namely, by the Most Serene Elector of Saxony in Saxony, and by the Most Serene Elector Palatine in Franconia; and to these was added, by *Capitulatio Leopoldina* (art. 4), the Duke of Savoy in Italy.

I know that a controversy has arisen with regard to the Palatine Vicariate because of the transference, by the *Instrument of Germanic Peace*, of the Upper Palatinate, together with the Electorate and the rights appurtenant thereto, to the Ducal line of Wilhelm. But, in addition to the reasons 56 of other jurists, and especially of Conring, published in a special treatise on this matter, I employ an argument which seems to me conclusive enough and which is based on the *Instrument of Peace* (place named). Its words indicate that for the sake of peace nothing is to be taken away from Maximilian, the Most Serene Duke of Bavaria; yet they do not lay down, nor do reason and equity allow, that any addition should be made to the rights already in his possession or quasi-possession. There was no exercise of this Vicariate during the whole time of the Thirty Years' War in Germany, because the Empire was never then vacant; for, when Ferdinand III, of glorious memory, was elected Emperor, his most august father, Ferdinand II, was still alive, and so there was no opportunity for an interregnum or for the rule of the Vicariate until the death of the Emperor Ferdinand III. This 57 was the time when the controversy named was first mooted, in consequence of the failure of the former possession or quasi-possession. Now, the Vicariate ought not to be deemed included in the rights which were transferred under the *Instrument of Peace*, for this would involve an extensive application of restrictive words contrary to the canons of sound interpretation.

Meanwhile it is clear that, during an interregnum, the Estates are not 58 free, but are bound, by whatever laws there are, to take measures for creating a new King or head, as I said above, following Tacitus, about the Armenians when they were electing Vonones King after the death of Arioobarzanes. In default of this—that is, where all are equal and there is no ruler—the general welfare of the public will go to ruin. It was on this account that, after the death of Cambyses (as Justinus tells), the seven Magnates of Persia submitted to lot the election of one of their number to be King; in this way Darius reached the royal dignity, as we also know from Herodotus and other writers.

A discussion has been raised by some about the power of the Estates of 59 Germany after the extinction of the Carolingian line, Whether they were within their right in transferring the Imperial crown to Conrad I while Carolingians still survived in France. But the defense of the Romano-Germanic Empire in this matter rests on seven hundred and odd years of possession or quasi-possession, on the admission of the Kings of France and their recognition of the separate Germanic Empire (which, while notorious in other

ways, received by name the express approval of King Henry IV of France in a classification of European powers) and on the diversity of stock—for the Carolingian line in France came to an end some time ago and was followed 60 by the house of Capet, and it by the Bourbons. It is the opposite opinion that needs defense; and, if the censors are just, Aubere is hardly an adequate champion, as it seems to me.

But enough of this. By the favor of God I have been enabled to complete this treatise on the Law of Nations, wherein are also inserted, in their proper place, the Laws of Nature.

To God be Praise and Glory Everlasting.

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